Petition

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. A-577

HENRY MARTINEZ PORTER, Petitioner,

v.

THE STATE OF TEXAS, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

DOUGLAS TINKER
Tinker & Tor
Attorneys at Law
622 S. Tancahua
Corpus Christi, Texas 78403
(512) 882-4378

JOHN M. ANDERSON
Attorney at Law
1102 Continental Life Bldg.
Fort Worth, Texas 76102
(817) 336-3340

January 21, 1982

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SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. A-577

HENRY MARTINEZ PORTER,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas, entered October 21, 1981 (Exhibit A). The Petitioner's First Motion For Leave to File a Motion for Rehearing was denied on November 25, 1981, without written opinion (Exhibit B). An order staying the execution and enforcement of the sentence of death was signed on December 28, 1981 by Byron R. White, Associate Justice of the Supreme Court of the United States (Exhibit C).

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Opinion, Court of Criminal Appeals

Voir Dire examination of:

Susan Pace Herndon
Zenon Martinez, Jr.
Alonzo Vaughn
Esiquio Cantu
Beth Prue
Joyce Rice

CITATIONS TO OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals was delivered on October 21, 1981, and is numbered 68,336.

Petitioner's First Motion For Leave to File A Motion For Rehearing was denied on November 25, 1981. A copy of the Court's Opinion is attached as Exhibit "A".

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the rule in Witherspoon v. Illinois, 391 U.S. 510 (1968) was violated by the exclusion for cause of six prospective jurors who were not disqualified to serve as jurors in the capital case.

2. Whether the Court of Criminal Appeals of Texas erred in ruling that Petitioner had not been denied Due Process as a result of the Trial Court's failure to order a psychiatirc examination of Petitioner when a request for the same was made by both Petitioner and the State after it was revealed to the Court by the State that Petitioner had had psychiatric problems in the past.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eight and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Texas law:

Texas Penal Code, Article 12.31. Capital Felony.

(a) An individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or by death.

(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

Texas Code of Criminal Procedure, Article 37.071. Procedure in Capital Cases.

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and
(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

STATEMENT OF THE CASE

On May 20, 1976, the Petitioner, HENRY MARTINEZ PORTER, was charged by indictment with the capital offense of intentionally and knowingly causing the death of HENRY P. MAILLOUX, a Peace Officer for the Police Department of the City of Fort Worth, Texas, on or about November 29, 1975, by shooting him with a firearm when the Defendant knew that HENRY P. MAILLOUX was a Peace Officer acting in the lawful discharge of his official duties at the time of his death. The first trial was held in Fort Worth, Tarrant County, Texas, on June 1, 1976. The jury returned a verdict guilty of Capital Murder on Petitoner's plea of not guilty and after a hearing on punishment the jury answered yes to each of the three issues submitted by the Court. This conviction was reversed by the Court of Criminal Appeals of Texas, by written opinion on the 28th day of March, 1979.

The second trial was held on May 14, 1979, in the 214th Judicial District Court of Nueces County, Texas, (Corpus Christi) after Petitioner's Motion for a Change of Venue was granted. The jury returned a verdict of guilty of Capital Murder on Petitioner's plea of not guilty and after a hearing on punishment the jury answered yes to each of the three issues submitted by the Court. The Court of Criminal Appeals affirmed the second conviction by written opinion dated October 21, 1981, and denied Petitioner's Motion for Leave to File a Motion for Rehearing on November 25, 1981, without written opinion.

Petitioner has been incarcerated on Death Row at Huntsville, Texas, since his first conviction in June of 1976, with the exception of time in Court on his second trial.

Petitioner is a Mexican-American male with a long history of law violations which resulted in prison terms in both State and Federal prisons. Petitioner also had a history of psychiatric problems as a youth.

During the voir dire examination of prospective jurors six persons were challenged for cause by the state and improperly excused by the trial judge. These six persons were not properly disqualified from serving as jurors in the capital murder case. These persons were as follows:

Susan Pace Herndon, (R. pp. 273-276)
Zeno Martinez, Jr., (R. pp. 552-565)
Alonzo Vaughn, (R. pp. 609-619)
Esiquio Cantu, (R. pp. 815-826)
Beth Prue, (R. pp.1161-1171)
Joyce Rice (R. pp. 1095-1112)

The examination of the above named jurors is attached hereto marked as Exhibit "D".

After the jury selection process had been concluded and prior to the indictment being read to the jury, the prosecuting attorney informed the Court and defense counsel that he had in his files evidence that Petitioner had psychiatric problems, (R. pp. 1633-1635). The prosecutor stated that records in his file showed that Petitioner in the past had been sent to a mental hospital in Austin where he had escaped and also a "military history" that reflected the Petitioner had hallucinations. Further information reflected that Petitioner had been sent to Waterville State School for boys because he had hallucinations of seeing his father and speaking to him, (R. p. 1636).

Petitioner's attorney upon gaining this knowledge requested that the Court have Petitioner examined by a Psychiatrist with the limitation that the Psychiatrist not be called as a witness at the punishment hearing, (R. p. 1862).

The limitation was put on the request because of the hazard of assisting the prosecution in getting the death penalty by such examination, (R. p. 1864). The request was made that the inquiry be limited to ability to stand trial and the defense of insanity. The prosecution requested an examination at this time, (R. p. 1865). The request was again made, (R. p. 1866), and was denied by the trial court.

REASONS FOR GRANTING THE WRIT

1. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE RULE IN WITHERSPOON V. ILLINOIS, 391, U.S. 510 (1968) WAS VIOALTED BY THE EXCLUSION FOR CAUSE OF SIX PROSPECTIVE JURORS WHO WERE NOT DISQUALIFIED TO SERVE AS JURORS IN THE CAPITAL CASE.

After reading and examining with close scrutiny the entire vair dire examination of prosepective jurors SUSAN PACE HERNDON, ZENON MARTINEZ, JR., ALONZO VAUGHN, ESIQUIO CANTU, BETH PRUE, and JOYCE RICE it is apparent that these six jurors were not properly disqualified from serving as jurors in the capital murder case. This conclusion is buttressed by the Supreme Court's decision of Adams v. Texas, 448 U.S. 28, 100 S. Ct. . 2521, 65 L. Ed. 2d 581 (1980), and Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed 2d 776 (1968), as well as the Fifth Circuits decisions of Burns v. Estelle, 626 F2d 396 (1980); 592 F2d 1297 (1979). See also Art. 37.071 V.A.C.C.P. The six jurors were imporperly challenged for cause by the state's prosecutor, and were improperly excused by the trial judge.

Here, the trial Court did not make any spcific findings that the prospective jurors were being excluded for cause under Witherspoon independently of or in conjunction with V.T.C.A. Penal Code, Sec. 12.31 (b).

The exclusion of the six jurors was based upon resonses closely analogous to those condemned by the Supreme Court in Maxwell v. Bishop, 398 U.S. 262, 90 S. Ct. 1578, 26 L. Ed. 2d 221 (1970); Segura v. Patterson, 403 U.S. 948, 29 L. Ed. 859, 91 S. Ct. 2291 (1971), Funicello v. New Jersey, 403 U.S. 948, 29 L. Ed. 859, 91 S. Ct. 2291 (1971); Harris v. Texas, 457 S.W. 2d 903 (1970), 403 U.S. 947, 91 S. Ct. 2291, 29 L. Ed. 2d 859 (1971).

The voir dire examination of the prospective jurors in this cause was as follows: the trial judge first covered

general considerations of the trial and of the voir dire; this was followed by voir dire examination first by the state's attorney, then by defense counsel.

The questioning of the juror SUSAN PACE HERNDON by the prosecutor began at (R. p. 273); the questions and answers were pat. The juror generally stated that she did not beleive in the death penalty and could not give it regardless of what the facts showed.

On cross-examination beginning at (R. p. 275) appellant asks the question directly from Burns v. Estelle, 592 F 2d 1297.

"Q. Despite the convictions that you have, can you put these aside, if you were on this jury, and do your duty as a citizen? Despite what your personal convictions may be, could you set those aside and serve, and do your duty as a juror in a capital murder case?"

"A. Yes, I could do my duty as a juror."

The trial judge than sustained the challenge even though the Burns and Witherspoon cases were called to the court's attention.

When the juror ZENON MARTINEZ, JR. was questioned beginning at (R. p. 553) his responses generally indicated a reluctance to give the death penalty. At (R. p. 555) when aksed if he had any objection to the death penalty and then when he was told that the range of punishment was life or death, he responded, "no, I don't have no objection." At (R. P. 556) he stated "no, I couldn't." On cross-examination, he stated his true feeling at (R. p. 564) "I would just have it on my conscious, that is all", and that he would worry about it as he decided the facts in the case.

When an attempt was made to question the juror further, an objection was made by the prosecutor which was sustained and no further questions were premitted. At this point, the challenge of the state was sustained over appeallant's objection and the court's attention was again called to Burns and Witherspoon.

Without stating it in so many words, the court apparently excused this juror under Art. 12.31 (b) Texas Penal Code as the juror was saying it would bother him or effect him in deciding the facts.

Juror ALONZO VAUGHN was questioned beginning at (R. p. 608) and generally expressed a disbelief in the death penalty and said he could not do it saying he "never could", (R. p. 611). At (R. p. 613) even though still being questioned by the prosecutor he qualified his feeling by saying "that is my feeling now."

On cross-examination, VAUGHN again demonstrated that he did not have an extreme and compelling prejudice against the death penalty by saying at (R. p. 615) "I am willing to listen to the evidence to see what ---- it could be different, I don't know. But my feelings now, as it stands now ----" and then was interrupted by an objection from the prosecutor.

Again VAUGHN demonstrated only a reluctance as far as the death penalty was concerned by saying in response to the question "could you listen to the evidence and do your duty as a citizen, despite the feeling you have about the death penalty? What you do is going to depend on the evidence, is that right?"

A. "Yeah, I imagine so. It would if I am understanding you right."

The court after a few more questions excused the juror over Petitioner's objection.

Juror ESIQUIO CANTU was interrogated beginning at (R. p. 815) by the prosecution and generally stated he had religious beliefs against the death penalty and could not do it.

When the appellant attempted to ask the question directly from Burns, supra, that is, could the juror put aside his convictions against the death penalty and do his duty as a juror, the prosecutor objected and appellant was not permitted to ask the question. (R. p. 824).

At (R. p. 826) without further questions concerning the death penalty the juror was excused for cause over appellant's objection.

Juror JOYCE MIKAN RICE was questioned beginning at (R. p. 1095) and again stated generally that she did not believe in the death penalty in a qualified way, (R. p. 1098) "I would feel guilty" and when asked if she would exclude the death penalty, regardless of what the facts may be she gave a qualified answer of "I would assume, yes." These answers clearly do not exclude her under the Witherspoon test.

She again qualified her answer to the prosecutor by saying in answer to the prosecutor's question she would vote no because of what it would do to her. (R. p. 1100 line 9). When asked by the prosecutor if she could change her mind after hearing the facts, she qualified it again and said "I don't believe so."

Finally after some bedgering on, direct by the prosecutor, she stated she could not give the death penalty. (R. pp. 1102-1103).

On cross-examination, the juror then told her true feeling that she believed in the death penalty as long as someone else does it (R. p. 1104). A. "Yes". She again at (R. p. 1104) said she did believe in the death penalty except she did not want to have to do it herself. A. "yes, sir" (R. p. 1105) (thus we submit demonstrating only a reluctance).

The juror demonstrated at (R. p. 1108) her true feeling was that she just did not know if she could give the death penalty or not.

In this regard, it is interesting to note that the trial judge commented "I think she is qualified. I think this is exactly what Witherspoon had in mind."

On re-direct, the juror then state she could not give the death penalty and when appellant wanted to ask her questions or re-cross the judge refused to permit any questions from appellant and excused the juror over objection.

Juror BETH PRUE was questioned on direct beginning at (R. p. 1162) and generally stated she could never give the death penalty.

When appellant's attorney attempted to ask the question directly from Burns i.e., "whether or not you can, despite your expressed convictions, can you, and your disbelief in the death penalty, could you set those aside, if chosen on this jury, and do your duty as a citizen and decide the facts as they are presented to you?" (R. p. 1170).

An objection was made and sustained and the challenge for cause granted over objection. (R. p. 1171).

These prospective jurors have not stated absolutely and equivocally that they would automatically, blindly, vote "no" to one of the special issues to avoid imposition of the death penalty, as must be shown to disqualify a juror under the Witherspoon - Adams test.

It is quite obvious that these six jurors did not, from a "totality of the circumstances," give unequivocal and absolute answers sufficient to render them disqualified from serving as jurors in this capital murder case. A reading of the record does not show that they were adequately and sufficiently informed about the Texas death penalty proceedure to render them to be totally disqualified from serving, at least no by the answers they gave. It is apparent that these jurors were either "equivocating jurors", "vacillating jurors", or "confused jurors", and that the state was bent on organizing a tribunal for the purpose of returning a verdict of death.

2. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE COURT OF CRIMINAL APPEALS OF TEXAS ERRED IN RULING THAT PETITIONER HAD NOT BEEN DENIED DUE PROCESS AS A RESULT OF THE TRIAL COURT'S FAILURE TO ORDER A PSYCHIATRIC EXAMINATION OF PETITIONER WHEN A REQUEST FOR THE SAME WAS MADE BY BOTH PETITIONER AND THE STATE AFTER IT WAS REVEALED TO THE COURT BY THE STATE THAT PETITIONER HAD HAD PSYCHIACTRIC PROBLEMS IN THE PAST.

Ater the jury selection process had been concluded and just prior to the indictment being read to the jury the prosecutor informed the court and defense counsel that he had in his files evidence that Petitioner had psychiatric problems. (R. p. 1633).

At (R. p. 1635), the prosecutor states that records in his file showed that Petitioner in the past had been sent to a mental hospital in Austin where he had escaped and also a "military history" reflected the Petitioner had hallucinations.

When this was turned over to the defense it was further clarified to reflect that Petitioner had been sent to Waterville State School for boys because he had hallucinations of seeing his father and speaking to him. (R. p. 1636).

Petitioner upon gaining this knowledge requested that the Court have Petitioner examined by a psychiatrist with the limitation that the psychiatrist not be called at the punishment hearing. (R. p. 1862).

The limitation was put on the request because of hazard of assisting the prosecution in getting the death sentence by such examination. (R. p. 1864). The request was made that the inquiry be limited to abiltiy to stand trial and the defense of insanity. The case of Pate vs. Robinson was called to the attention of the Court during this request.

It is interesting to note that the prosecution at that point pointed out to the court that "case law" required an examination at that time. (R. p. 1865).

Even though the request was again made at (R. p. 1866) that such test be run the court denied the request.

Pate vs. Robinson, 383 U.S. 375, is of course the leading case with regard to the question here before the Court. In Pate, the supreme court for the first time stated that if insanity or incompetency is called to the attention of the trial court he has a duty on his own motion to hold a

separate hearing on an accuseds' competency to stand trial. Pate, supra also points out that there is no waiver of this question due to a lack of a formal motion demanding a psychiatric hearing.

In Townsend vs. State, 437 SW 2d 55, the Texas courts follow Pate supra and for the first time require the Texas trial judges to hold a hearing of some kind when a question of insanity or incompetency is raised during the trial.

"The court in Pate did not reveal the extent of inquiry to satisfy due process requirements, but it would appear at the minimum that a separate hearing for determination of competency is obligatory xxxx."

Perryman vs. State, 494 SW 2d 542 (1973) also supports Petitioner's position here requiring the trial court to take some action when the possibility of mental illness arises.

In the instant case, the prosecutor had in his file evidence of insanity for many years but did not inform the court or defense counsel until after the jury selection had been concluded.

When this documentary evidence was revealed, Petitioner's attorneys were not convinced of his insanity but requested the courts help in conducting a psychiatric examination to determine if Petitioner was in fact, insane.

The sticky problem for the trial court and now this court is, can the trial court order such examination for the accused and then prohibit the State from using the same psychiatrist to get the death penalty if his conclusion is that the accused is not insane.

Petitioner says that due process and justice and the above authorities require the examination requested without the accused risking death if the psychiatrist came up with a damaging opinion. Petitioner had been incarcerated on death row in Huntsville, Texas, since conviction in his first trial.

CONCLUSION

Petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

JOHN M. ANDERSON
1102 Continental Life Bldg.
Fort Worth, Texas 76102
(817) 336-3340
State Bar No. 01195000

ATTORNEY FOR THE PETITIONER

January 21, 1982

DOUGLAS TINKER
Tinker & Tor
Attorneys at Law
622 S. Tancahua
Corpus Christi, Texas 78403

ATTORNEY FOR THE PETITIONER

Appendix

A P P E N D I X

Opinion, Court of Criminal Appeals

Voir Dire Examination Of:

SUSAN PACE HERNDON

ZENON MARTINEZ, JR.

ALONZO VAUGHN

ESIQUIO CANTU

BETH PRUE

JOYCE RICE

HENRY MARTINEZ PORTER, Appellant

NO. 68,336 v. -- Appeal from NUECES County

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a conviction for the offense of capital murder. The punishment is death. The appellant had been previously tried and convicted for the same offense but the judgment was reversed and cause remanded in Porter v. State, 578 S.W.2d 742 (Tex.Cr.App. 1979). The case was retried in Nueces County after the venue was changed from Tarrant County.

The appellant asserts that the trial court erred in the following ways: by overruling his challenge to the array of the jury panel, by excusing improperly for cause several prospective jurors, by not ordering a psychiatric examination of the appellant, by not allowing the appellant's expert to examine the weapons that were introduced in evidence, by admitting an oral statement of the appellant made while he was in custody, by admitting in evidence a tape recording of police communications, and by allowing in evidence testimony concerning an extraneous offense.

The appellant in his first five grounds of error complains that the trial court erred in overruling his challenge to the array of the jury panel and in refusing to issue attachments for those who had been summoned but had not reported for jury duty.

The appellant filed a written challenge to the array pursuant to Art. 35.07, V.A.C.C.P. alleging that "jurors have been excused by individuals not authorized by law to excuse them such as deputy clerks and other law enforcement officers." A hearing was held and the appellant presented the testimony of Charles Nay. Nay testified that he was the court administrator and that he had for the court issued the summons for the jury.

He stated that in each of the two groups summoned not all of the summoned jurors had appeared. He said some had legal excuses but a large number did not respond at all to the summons. Nay stated that he did not know whether or not someone who was not authorized by law had excused these jurors. However, he added that more than likely the ones not appearing had moved out of the county. The appellant, after the hearing, requested that each juror who had not responded be attached. The request was denied and appellant's challenge to the array was overruled.

We conclude that the trial court did not err in its rulings. Art. 35.07, supra, states:

> "Each party may challenge the array only on the ground that the officer summoning the jury has wilfully summoned jurors with a view to securing a conviction or an acquittal. All such challenges must be in writing setting forth distinctly the grounds of such challenge. When made by the defendant, it must be supported by his affidavit or the affidavit of any credible person. When such challenge is made, the judge shall hear evidence and decide without delay whether or not the challenge shall be sustained."

The evidence presented by the appellant fails to show that a person unauthorized by law excused the prospective jurors or that a person "wilfully summoned jurors with a view to securing a conviction or an acquittal." The evidence only shows that several prospective jurors did not respond to the summons; nothing indicates that someone improperly excused them. See Dent v. State, 504 S.W.2d 455 (Tex.Cr.App. 1974). The trial court did not err in not attaching the jurors. Art. 35.01, V.A.C.C.P., which provides for the attachment of absent jurors, is directory and not mandatory. Moreno v. State, 587 S.W.2d 405 (Tex.Cr.App. 1979); Dent v. State, supra. The appellant has failed to establish that an injury occurred by the trial court's failure to grant his request for attachments. Moreno v. State, supra; Dent v. State, supra; Esquivel v. State, 595 S.W.2d 516 (Tex.Cr. App. 1980). No abuse of discretion has been shown; appellant's grounds of error are overruled.

In his next eighteen grounds of error the appellant contends that the trial court improperly excused for cause six jurors. The first juror, Susan Pace Herndon, was improperly excused, the appellant argues, because the following exchange from the final question asked the juror shows that under the holding of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) she was qualified to serve:

> "Q. Despite the convictions that you have, can you put those aside, if you were on this jury, and do your duty as a citizen? Despite what your personal convictions may be, could you set those aside and serve, and do your duty as a juror in a capital murder case?
>
> "A. Yes, I could do my duty as a juror."

However, Herndon previously testified that she had a long standing belief against the death penalty, that she could never impose it, and that she would vote automatically against the imposition of the death penalty no matter what the evidence at trial revealed. When asked by defense counsel if there was any way he could get her to agree that there are some cases where she thought the death penalty was a possibility, she responded there was not.

The entire voir dire examination of Susan Herndon was quite short and when taken as a whole makes it unmistakably clear her views "would prevent or sutstantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oaths and would prevent [her] from consider[ing] and decid[ing] the facts impartially and conscientiously apply[ing] the law as charged by the court." Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Witherspoon v. Illinois, supra. The appellant apparently argues that the final response by the juror that she could do her duty as a juror demonstrates that she was

qualified to serve as a juror under Witherspoon. Indeed the appellant makes the same argument concerning the other excused veniremen; however, the argument is without merit. The question was very broad and provided little, if any, insight into her ability to serve as a juror. Nothing in the juror's response indicates that she was willing to follow the trial court's instructions and base her decision upon the evidence presented. The final question and answer were not sufficient to rehabilitate the juror and overcome her earlier testimony that she would automatically vote against the imposition of the death penalty regardless of the facts and circumstances that might emerge during the trial. Vigneault v. State, 600 S.W.2d 318 (Tex.Cr.App. 1980). Appellant's reliance upon Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979) aff'd 626 F.2d 396 (1980) is misplaced. In Burns a prospective juror stated three times she was opposed to the death penalty and its possible infliction would affect her deliberations. She was excused for cause and she was asked no further questions. The court vacated judgment, stating that the juror was not disqualified under Witherspoon and that other questions should have been propounded to the juror. This is clearly not the case with this venireman. She had earnestly stated her opposition to the death penalty and she would automatically vote against it. The juror was properly excused for cause. Witherspoon v. Illinois, supra; Vigneault v. State, supra; Ex parte Chambers, 612 S.W.2d 572 (Tex.Cr.App. 1981); Sanne v. State, 609 S.W.2d 762 (Tex.Cr.App. 1980); Russell v. State, 598 S.W.2d 238 (Tex.Cr.App. 1980) cert. denied, ___U.S.___, 101 S.Ct. 444, 66 L.Ed.2d 300.

The appellant also complains that venireman Zeon Martinez, Jr. was improperly excused for cause. Martinez when questioned during the voir dire examination stated he did not have any objection when told the punishment for capital murder was either life or death. However, when asked if he could assess the death penalty he stated that he could not. He stated that it was a strong belief and when asked if he would vote against the death penalty regardless of the facts he said yes. The prosecutor then explained the special issue questions under Art. 37.071, V.A.C.C.P. that the jury would have to answer. The juror stated he would automatically vote "No" to the questions because he would not want to sentence a man to death regardless of the facts and evidence. When asked on cross-examination if he could set aside his beliefs and do his duty as a citizen serving on this jury, Martinez said no. When asked how it would affect his deliberations Martinez stated that he had never killed anyone, that it would be on his conscience, and that he would worry about it when deciding the case.

The appellant argues that Martinez was qualified under Witherspoon and that the trial court excused him under V.T.C.A. Penal Code, Sec. 12.31(b) in violation of the holding in Adams v. Texas, supra. The contention is without merit. The juror repeatedly stated he would vote against the death penalty regardless of the evidence presented and further stated he could not set aside his beliefs if he served on the jury. The juror was properly excused; no error has been shown. Vigneault v. State, supra; Ex parte Chambers, supra; Sanne v. State, supra. Compare Grijalva v. State, 614 S.W.2d 420 (Tex.Cr.App. 1981).

The appellant next asserts that venireman Alonzo Vaughn was excused in violation of the principles of Witherspoon. Mr. Vaughn testified that he had a long-standing belief against the death penalty. He stated several times that he would always vote against the death penalty regardless of the facts.

The appellant argues that despite these statements Vaughn was improperly excused because he qualified his feelings by saying, "You know, what I'm saying, that is my feeling. I would not vote for the death penalty, is my feelings now." Additionally the appellant relies upon the following testimony:

> "Q. And could you set aside right now and later to the evidence and honestly answer whatever questions you are required to answer?
>
> "A. I'm willing to listen to the evidence to see what -- it could be different, I don't know. But, my feeling now, as it stands now --
>
> * * * *
>
> "Q. Could you listen to the evidence in the case, and do your duty as a citizen; despite the feeling you have about the death penalty? What you do is going to depend on the evidence; is that right?
>
> "A. Yeah, I imagine so. It would -- if I'm understanding you right."

When re-examined by the State, the process of reaching a verdict through the special issue questions under Art. 37.071, supra, was again explained to the juror. He then stated he would automatically vote "No" to the special issues.

Venireman Vaughn's testimony is unmistakeably clear that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him. The appellant's contention is devoid of merit. Lockett v. Ohio, supra; Vigneault v. State, supra; Ex parte Chambers, supra; Sanne v. State, supra.

The appellant asserts that Esiquio Cantu and Beth Prue were improperly excused. Initially, we note that the appellant at trial failed to base his objections to the excusing of the jurors upon Witherspoon grounds. Only general objections were made, nothing is presented for review. May v. State, 618 S.W.2d 333 (Tex.Cr.App. 1981). Nonetheless we have examined the voir dire of these jurors and agree that they were properly excused. Mr. Cantu stated that he did not believe in the death penalty, that he could never impose it regardless of the facts, and that he would always vote against it, regardless of the facts and circumstances presented during the trial. Mrs. Prue stated that she also did not believe in capital punishment, that she would vote against it regardless of the evidence presented and would vote "No" to the special issue questions to avoid imposing the death penalty. The two veniremen were properly excused. Lockett v. Ohio, supra; Vigneault v. State, supra; Ex parte Chambers, supra; Sanne v. State, supra.

The appellant in his final complaint about the excused prospective jurors argues that Joyce Rice was qualified under Witherspoon and should not have been excused. Again the appellant failed to make a specific objection when Mrs. Rice was excused and nothing is presented for review. May v. State, supra. We nonetheless have reviewed the voir dire examination of Mrs. Rice. While her testimony is not as definite as the previously discussed veniremen it is sufficient to show that Mrs. Rice was properly excused for cause. During direct examination she stated she was not opposed to the death penalty but could not live with herself if she participated in returning a death penalty. When asked if she would exclude the death penalty regardless of what the facts revealed she said, "I would assume, yes." She later added that she would answer "No" to the special issue questions because of what a "Yes" answer would do to her. On cross-examination the juror stated she believed in the death penalty but did not want to do it herself. She indicated she could set aside her reluctance

and determine guilt or innocence. However, when asked if she could set aside this reluctance and "do your duty as a citizen and make whatever decision based upon the evidence before you that the law might require" she said she did not know. On redirect the following occurred:

> "Q. . . .[C]an you sit in judgment in this case . . . and assume the full responsibility of a juror and be fair to both sides as to the facts and the punishment and take that oath of office.
>
> "A. No.
>
> * * * *
>
> "Q. . . .[W]ould you vote against the death penalty as a juror in a capital murder case, regardless of the facts and circumstances that might emerge during the trial of the case?
>
> "A. Yes, sir.
>
> "Q. And, as you sit here right now, are you irrevocably committed at this time to vote against the death penalty, regardless of the facts and circumstances that might emerge during the trial?
>
> "A. Yes, sir."

This testimony of the venireman made it clear that she could not be trusted to abide by existing law or follow conscientiously the instructions of the trial judge. Lockett v. Ohio, supra; Vigneault v. State, supra; Ex parte Chambers, supra; Sanne v. State, supra. No error has been shown.

The appellant in four grounds of error contends that the trial court erred in not ordering a psychiatric examination of the appellant after the court became aware that the appellant had had psychiatric problems in the past. After the selection of the jurors but prior to the offer of any evidence before them, the prosecution notified the trial court and defense counsel that they had found a document concerned with the appellant in their files. The document was described as an incomplete report and it was neither signed nor dated. Under the heading

"Social History" it stated that the appellant was sent to a hospital in Austin and that he escaped. Under the heading "Military History" the document stated that the appellant was sent to the State Hospital at Austin from the Waterville State School for Boys because appellant had hallucinations of seeing his father. It stated that appellant later ran away from the hospital. This document does not appear in the record before us.

The day after the State informed defense counsel about the document, appellant's attorney requested that the trial court appoint a psychiatrist to examine the appellant and determine his competency to stand trial. He, however, conditioned his request upon an agreement that the results of the examination would not be used during the punishment phase of the trial. The trial court refused to agree and the appellant withdrew his motion.

The appellant first argues that the trial court erred in not granting his motion that the results of any psychiatric examination for competency not be used in the punishment phase. This Court in the past has ruled that no error occurred when an accused was examined by a psychiatrist to determine competency but later testified as to the accused's future dangerousness at the punishment stage of the trial. Hammett v. State, 578 S.W.2d 699 (Tex.Cr.App. 1979), petition for cert. withdrawn 448 U.S. 725, 100 S.Ct. 2905, 65 L.Ed.2d 1086; Ghoulson v. State, 542 S.W.2d 395 (Tex.Cr.App. 1976), cert. denied 432 U.S. 911, 97 S.Ct. 2960, 53 L.Ed.2d 1084; Livingston v. State, 542 S.W.2d 655 (Tex.Cr.App. 1976), cert. denied 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250. These decisions occurred before the recent Supreme Court opinion in Estelle v. Smith, ___U.S.___, 101 S.Ct. 1866, ___L.Ed.2d___(1981) and their continuing viability may be questioned. However, we do

not need to reach that issue in order to make a proper disposition of the matter before us. Here, no psychiatric testimony from a competency examination was admitted during the punishment phase of the trial. Thus the only question raised is whether the trial court erred in not ordering a psychiatric examination of the appellant.

Art. 46.02, Sec. 3(a), V.A.C.C.P. provides, as follows:

> "At any time the issue of the defendant's incompetency to stand trial is raised, the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health or mental retardation to examine the defendant with regard to his competency to stand trial and to testify at any trial or hearing on this issue."

The issue of a defendant's incompetency to stand trial is raised if "the court determines there is evidence to support a finding of incompetency to stand trial." Art. 46.02, Sec. 2(a), supra. In Sisco v. State, 599 S.W.2d 607 (Tex.Cr.App. 1980) we stated:

> "We are, therefore, constrained to hold that, in determining after hearing held in advance of a trial on the merits whether 'there is evidence to support a finding of incompetency to stand trial,' the trial court is to assay just that evidence tending to show incompetency, putting aside all competing indications of competency, to find whether there is some evidence, a quantity more than none or a scintilla, that rationally may lead to a conclusion of incompetency."

In the case before us the only evidence that pertains to the appellant's incompetency to stand trial is a report that was undated, unsigned, and of unknown origin. The behavior mentioned in the report apparently occurred when the appellant was a boy or a young man; the appellant was thirty-seven years old at the time of the trial. The behavior in the report does not give any indication that the appellant did not have a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against him." No other

evidence concerning the appellant's competency was presented and appellant's behavior throughout the trial was not such as to raise any issue of his incompetency. The appellant did not request a hearing on incompetency. There was simply no evidence whatsoever offered which dealt with the appellant's present incompetency to stand trial. We conclude that the trial court did not abuse its discretion in not ordering a psychiatric examination of the appellant. Sisco v. State, supra. Compare Stiehl v. State, 585 S.W.2d 716 (Tex.Cr.App. 1979) cert. denied ___ U.S.____, 101 S.Ct. 926, 66 L.Ed.2d 843; Bowens v. State, 507 S.W.2d 785 (Tex.Cr.App. 1974); Hill v. State, 429 S.W.2d 481 (Tex.Cr.App. 1968) cert. denied 393 U.S. 955, 89 S.Ct. 384, 21 L.Ed.2d 367.

The appellant also complains that the prosecution should have revealed the information contained in the document prior to the selection of the jury. Compare Ex parte Lewis, 587 S.W.2d 697 (Tex.Cr.App. 1979). However, the record reveals that the prosecution informed the appellant about the document as soon as they became aware of it. No error is shown.

The appellant in his next two grounds of error contends that the trial court erred in not allowing the appellant's own expert to examine the weapons introduced in evidence and in not granting a postponement of the trial to allow time for his expert to examine the weapons.

In a motion in limine the appellant prior to trial requested the opportunity to have his own expert examine and run tests on the weapons involved in the case. The trial court at a pretrial proceeding told the appellant he could run the tests "if he wants to." Later that day the appellant requested that the trial be postponed or delayed in order for his expert to conduct the examinations and tests. The court denied the request for the continuance noting, "You can do it during the trial if you want to, but I'm

not going to delay the trial to do it." The following day, the appellant informed the court that the expert he intended to use was unable to make the tests. Appellant stated he was trying to contact another particular expert. Another request for postponement was denied. Less than a week later while the jury was being selected, the trial court, at the request of the State, asked about the status of the appellant's expert. Appellant's counsel stated that he had not contacted the expert. The defense at trial did not present the testimony of an expert witness.

The appellant contends that his request to allow an expert to examine the evidence was denied and thus is violation of Art. 39.14, V.A.C.C.P. See Terrell v. State, 521 S.W.2d 618 (Tex.Cr.App. 1975); Detmering v. State, 481 S.W.2d 863 (Tex.Cr. App. 1972). However, a review of the record, as already outlined makes it clear that the trial court did in fact grant appellant's request. This contention is without merit.

Appellant further argues that it was error not to grant his request for a postponement. Art. 29.03, V.A.C.C.P. provides as follows

> " A criminal action may be continued on the written motion of the State or of the defendant, upon sufficient cause shown: which cause shall be fully set forth in the motion. A continuance may be only for as long as is necessary."

Art. 29.03, V.A.C.C.P. states:

> "All motions for continuance on the part of the defendant must be sworn to by himself."

Appellant's motion was neither in writing nor was it sworn to; nothing is presented for review. Minx v. State, 615 S.W.2d 748 (Tex.Cr.App. 1981); Allen v. State, 505 S.W.2d 923 (Tex.Cr.App. 1974).

Additionally we note that the appellant did not perfect the record by filing a timely motion for new trial with an affidavit from an expert witness or by showing under oath what the testimony would have been. Minx v. State, supra. The grounds of error are overruled.

The appellant next contends that his oral statement while in custody to a police officer was improperly admitted in evidence. Officer Clinton Hathorne testified that on December 1, 1975, he and other peace officers went to an apartment located in San Antonio to execute an arrest warrant for the appellant. After entering the apartment the officers found the appellant, placed him under arrest, and informed him of his rights. Officer Hathorne stated that after this was completed he saw three sealed envelopes in plain view on a table. One was addressed to the editor of the San Antonio News, another to the editor of the San Antonio Light, and the last to Harry Nass, Attorney at Law. Hathorne asked the appellant if the letters belonged to him and appellant replied that they were his. He added that they contained his confession to a murder and would clear his brother-in-law of any involvement in the murder of the Fort Worth policeman. Appellant argues that his oral statements were inadmissible under Art. 38.22, V.A.C.C.P.

Art. 38.22(1)(e), supra, then in effect stated the following:

> "The oral or written confession of a defendant made while the defendant was in jail or other place of confinement or in the custody of an officer shall be admissible if:
>
> "* * * *
>
> "(e) It be made orally and the defendant makes a statement of facts and circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument which he states the offense was committed."

Appellant contends that his statements did not lead to the discovery of evidence tending to establish his guilt. See Scott v. State 564 S.W.2d 759 (Tex.Cr.App. 1978); Smith v. State, 514 S.W.2d 749 (Tex.Cr.App. 1974). Compare Ashley v. State, 362 S.W.2d 847 (Tex.Cr.App. 1962) cert. denied 372 U.S. 956, 83 S.Ct. 955, 10 L.Ed.2d 10; Chase v. State, 508 S.W.2d 605 (Tex.Cr.App. 1974) cert. denied 419 U.S. 840, 95 S.Ct. 71, 42 L.Ed.2d 68.

The contention is without merit. A review of the record reveals that the same information contained in the oral statement was obtained from other sources. Officer Cole, a Fort Worth policeman, testified that Officer Hathorne gave him the three envelopes. Cole obtained oral and written consent from the appellant to open and examine the letters. Each envelope contained the same letter, which appeared to be in the same handwriting and each was signed Hanry Martinez Porter. The letter read as follows:

> "S.A. News, To Whom It May Concern: This is my confession to the death of the Fort Worth Police Officer which no one else was involved in but myself. I have read in the newspapers that the police are trying involving my former brother-in-law because his car that I had was in his name. However, my brother-in-law had nothing to do with the death or anything else that I have done. I had bought the car from him about four months ago and since I hadn't yet finished paying for the car, the title was still in his name. However, the car was mine and belonged to me and its responsibility lies with me. I haven't seen my brother-in-law for four months and I wish to make this clear. So, any statements by any of these persons trying to involve anyone else for my wrongdoings are false. This is my true statement. Signed, Henry M. Porter. Three copies have been made by me, one each to the news media and one to Mr. Nash, Attorney, who has been my former brother-in-law's attorney."

Additionally the appellant introduced in evidence the statement he made to Officer Cole on the day following his arrest. It stated in part:

> "Last night when I was arrested I had three letters that I had written. I told one of the San Antonio Officers that the letters were about the Fort Worth Policeman being shot and that they showed that Eddie Rodriquez did not have anything to do with shooting the Policeman.
>
> "Tonight I have signed a consent that was read and explained to me by Det. Cole saying that I did not object to him opening the letters."

The appellant's confession in the letters and his written statement contain the same information that appeared in his oral statement. The admission of that statement does not present reversible error. Brantley v. State, 522 S.W.2d 519 (Tex.Cr.App. 1975); Guitierrez v. State, 502 S.W.2d 746 (Tex.Cr.App. 1973).

In his next ground of error the appellant asserts that a tape recording and a transcript of the tape were improperly admitted in evidence. The tape had recorded the radio transmissions of the police on the day Officer Mailloux, the deceased, was shot.

Sergeant R.D. Burchfield testified that radio communications of the Fort Worth Police Department were continuously recorded twenty-hours a day. The recording admitted in evidence was a portion of that tape. He stated that he had care, custody, and control of the tape and that the tape was prepared in the ordinary course of business of the police department. Burchfield further testified that it was in the ordinary course of business for an employee or officer to have personal knowledge of the transmissions and broadcasts recorded on the tape. He added that the entries on the tape were made contemporaneously with the events they described. He stated that he was not present when the recordings were made, but that no changes in the tape had been made. Thomas Johnson testified that he was a civilian dispatcher for the police and was working on the day of the shooting. He said that the recording was accurate and that no alterations had been made to it. He added that he could identify all the voices on the tape, either by recognizing the sound of their voices or by their call number. The portion of tape about which the appellant complains is as follows:

> "(08:39:46)(YOUNG) '350 - Do you know - or did they leave you a note on the console - about that car wanted on the armed robbery at Almers Grocery on Hemphill? Do you know if it was picked up last night or not?'
>
> "(08:40:01((DISPATCHER) 'I have nothing on it 350. No notes, no nothing.'
>
> "(08:40:04)(YOUNG) '10-4.'
>
> "(08:40:28)(MAILLOUX) '351 to headquarters. Do you want the year, color, and make car that suspect's driving?'
>
> "(08:40:36)((DISPATCHER) 'I think we found one here. Channel C had it on a 36, 3723 Hemphill. Red pickup with a camper.'
>
> "(08:40:46)(MAILLOUX) 'No. This one is on that Mexican male that has been hitting us all over town. He was seen yesterday in a white '66 Ford Edward Sam Davis 695.'

"(08:40:58) (DISPATCHER) 'Edward Sam David 695?'

"(08:41:02) (MAILLOUX) '351-10-4. Spotted it at Hemphill and Magnolia, supposed to be that same one -- that hit, I believe it was 2628 Hemphill last week.'

"(08:41:13) (DISPATCHER) 'Okay. I don't know whether they got that one or not.'

The following portion of the tape was also admitted:

"(08:56:06)(MAILLOUX) '351 - Edward Sam David 695 36 Suspect turning north on Lipscomb off West Rosedale.'

"(08:56:13) (DISPATCHER) ' Lipscomb and West Rosedale.'

"(08:56:14 (MAILLOUX) 'Correction. He's still going on west. Had his turn indicator signal on.'

"(08:56:28)(DISPATCHER) 'Any unit around Lipscomb and Rosedale get with 351 on this 36 suspect.'

"(08:56:35) (MAILLOUX) 'He's turning north on College.'

"(08:56:37) (DISPATCHER) 'Northbound on College now.'

"(08:56:42) (YOUNG) '350 - Be careful about going around (unintelligible).'

"(08:56:46)(MAILLOUX) '10-4.'

"(08:56:52) (YOUNG) '350- Any unit that can get with 351 over there, that suspect is armed I suspect.'

"(08:56:58) (MORTON) '359 - I'm headed that way, what's his 20 now?'

"(08:57:02)(DISPATCHER) 'Last seen northbound on College from about Rosedale.'

"(08:57:04) (MAILLOUX) 'He's southbound on College. He's turning back. Correction I think he's going to pull over.'

"(08:57:16) (DISPATCHER) '359, your 20?'

"(08:57:18) (MORTON) '359 - I'm southbound on Rosedale. What hundred block of College is he in?'

"(08:57:23) (MAILLOUX) '351 - 1200 College.'

"(08:57:24) (DISPATCHER '1200 College.'

"(08:57:27) (MORTON) 'I'm on my way.'

"(08:57:49)(UNIDENTIFIED UNIT) 'Did he say 1100 College?'

"(08:57:52) (DISPATCHER)'1200.'

"(08:58:08) (DISPATCHER)'353?'

"(08:58:11)(WALLACE) '353 - Go ahead.'

"(08:58:12)(DISPATCHER) 'Go over to Jennings and Pennsylvania, Jennings and Pennsylvania with Unit 149.'

"(08:58:19)(WALLACE) '353 - 10 - 4. Same sheet.'

"(08:58:22)(MALONE) '355- I've got an officer shot here, send some help!'

The appellant did not at trial and does not now on appeal complain that the proper predicate, as required under Edwards v. State, 551 S.W.2d 731 (Tex.Cr.App. 1977), was not established for the admission of a sound recording. Rather appellant contends that the statements on the tape were hearsay and their admission denied him his right to confrontation and prejudiced his defense.

We do not agree with the appellant's contentions. The Business Record Act, Art. 3737(e), V.A.C.S., is a codification of the business record exception to the hearsay rule. It provides that a business record is admissible as evidence of an event if (1) it was made in the regular course of business, (2) it was the regular course of that business for an employee of that business with personal knowledge of the event to make a record, and (3) it was made at or near the time of the event. The tape was admissible as a business record as an exception to the hearsay rule. Officer Burchfield testified that the recording was made in the regular course of business, that it was the regular course of the police department for an employee of the police with personal knowledge of the event to make the recording, and the recording was made at the same time as the events recorded. The appellant argues that Officer Burchfield did not have personal knowledge of the acts and events preserved on the sound recording. However, Section 2 of the Business Records Act states in part:

> "The identity and mode of preparation of the memorandum or record in accordance with the provisions of paragraph one (1) may be proved by the testimony of the entrant, custodian, or other qualified witness even though he may not have personal knowledge as to the various items or contents of such memorandum or record."

Officer Burchfield testified he was the custodian of the sound recording; the appellant's contention is without merit. A proper predicate for the admission of the tape recording as a business record was established.

The appellant further argues that even if the proper predicate had been laid for the admission of the tape under Art. 3737e, supra, the tape nonetheless should not have been admitted in evidence. He contends that the tape does not have "the indicia of reliability to insure the integrity of the fact-finding process commensurates with the constitutional right of confrontation and cross-examination." McCrary v. State, 604 S.W.2d 113 (Tex.Cr. App. 1980); Sisson v. State, 561 S.W.2d 197 (Tex.Cr.App. 1978); Battes v. State, 543 S.W.2d 91 (Tex.Cr.App. 1976); Coulter v. State, 494 S.W.2d 876 (Tex.Cr.App. 1973). We have stated that even though the formal requirements for admissibility of a business record may be shown, the business record should not be automatically admitted in evidence. The fundamental trustworthiness of the record must be evident. Coulter v. State, supra.

However, in the case at bar the fundamental trustworthiness of the recording cannot be questioned. In our holdings in McCrary, Sisson, Battes , and Coulter the business records admitted in evidence were without a doubt prepared in anticipation of prosecution. The tape recording in the instant case was not made with a specific view toward prosecution in mind. As a matter of fact it is a rare situation in which such a recording would provide any probative value to a case. The sound recording allowed the police department to review the procedures used by their officers and to insure that information transmitted was accurately recorded. The appellant does not complain that the tape was inaccurate nor is there any indication in the record that it is inaccurate. We, therefore, conclude that the sound recording was of such trustworthiness as to guarantee the same

protection provided by the rights of confrontation and cross-examination. Burleson v. State, 585 S.W.2d 711 (Tex.Cr.App. 1979); United States v. Verlin, 466 F.Supp. 155 (N.D. Tex. 1979).

The appellant apparently also argues that the statements contained on the tape are hearsay upon hearsay. He contends that while the tape may be admissible under Art. 3737e, supra, statements appearing on tape are themselves hearsay and not admissible. See Smith v. Riviere, 248 S.W.2d 526 (Tex.Civ.App.-Texarkana 1951), no writ history. However, we initially note that the appellant's objection to the admission of the tape was based upon the tape itself being hearsay. The appellant, even though he was given a chance to review the recording before its admission, failed to make a specific objection that certain statements on the tape were based upon further hearsay. The appellant failed to bring to the court's attention which statements he believed to be additional hearsay and should be excised from the remainder of the tape recording. Nonetheless we have reviewed the statements recorded on the tape and conclude that they are not hearsay.

It is well established that an extra-judicial statement or writing offered for the purpose of showing what was said rather than for the truth of the matter stated therein does not constitute hearsay. Nixon v. State, 587 S.W.2d 709 (Tex.Cr.App. 1979); Norton v. State, 564 S.W.2d 718 (Tex.Cr.App. 1978); Gholson v. State, 542 S.W.2d 395 (Tex.Cr.App. 1976) cert. denied 432 U.S. 911, 97 S.Ct. 2960, 53 L.Ed.2d 1084. Compare Elder v. State, 614 S.W.2d 136 (Tex.Cr.App. 1981). The communications between the police officers and the dispatcher were not offered for the truth of matter stated. It was offered to show the circumstances surrounding and leading to the shooting. See Nixon v. State, supra; V.T.C.A. Penal Code, Sec. 19.06. Additionally, the statements were offered to show that the officer

was "acting in the lawful discharge of an official duty." V.T.C.A. Penal Code, Sec. 19.03(a)(1). Finally, the broadcasts of deceased as he was attempting to stop the automobile were admissible as res gestae statements. Trostle v. State, 588 S.W.2d 925 (Tex.Cr.App. 1979); Corbett v. State, 493 S.W.2d 940 (Tex.Cr.App. 1973) cert. denied 414 U.S. 1131, 94 S.Ct. 871, 38 L.Ed.2d 756. The sound recording was properly admitted in evidence; the appellant's ground of error is overruled.

In the appellant's remaining ground of error he asserts that it was error to allow in evidence testimony about an extraneous offense. At trial Susan Chandler testified that on November 18, 1875, the appellant robbed her at gunpoint. During the robbery the appellant knocked her unconscious. The court instructed the jury that it could consider the evidence of extraneous offense only for the purpose of determining the intent and motive of appellant. The appellant offered no objection to the instruction.

This Court has repeatedly stressed that an accused shall not be tried for some collateral crime or for being a criminal generally. Albrecht v. State, 486 S.W.2d 100 (Tex.Cr.App. 1972). This as a general rule evidence of extraneous offenses is inadmissible; however, several exceptions to the general rule exits. Yarbrough v. State, 617 S.W.2d 221 (Tex.Cr.App. 1981). Evidence of an extraneous offense which shows an accused's motive or intent is admissible if it is material and its relevancy to a material issue outweights its prejudicial potential. Yarbrough v. State, supra; Albrecht v. State, supra.

Appellant argues that since it is not necessary to establish motive in order to sustain a conviction for murder, Garcia v. State, 495 S.W.2d 257 (Tex.Cr.App. 1973), evidence of an extraneous offense showing motive should not be admitted. However, this

ignores that evidence of motive is one kind of evidence aiding in establishing proof of an alleged offense. Rodriquez v. State, 486 S.W.2d 355 (Tex.Cr.App. 1972). Thus the prosecution may always offer evidence to show motive for the commission of an offense because it is relevant as a circumstance to prove the commission of the offense. Of course, the testimony must fairly tend to raise an inference in favor of the existence of a motive on the part of the accused to commit the alleged offense. Rodriquez v. State, supra.

The evidence in this case reveals the commission of the offense of armed robbery by the appellant eleven days prior to the shooting. It is apparent that the evidence of the extraneous offense creates an inference that the appellant's motive in shooting the deceased was to avoid apprehension. The trial court did not err; the evidence was admissible for the purpose of showing motive. Barefoot v. State, 596 S.W.2d 875 (Tex.Cr.App. 1980); Hughes v. State, 563 S.W.2d 581 (Tex.Cr.App. 1978) cert. denied 440 U.S. 950, 99 S. Ct. 1432, 59 L.Ed.2d 640; Yarbrough v. State, supra; Russell v. State, 598 S.W.2d 238 (Tex.Cr.App. 1980). The ground of error is overruled.

The judgment is affirmed.

DALLY, Judge

Delivered October 21, 1981

EN BANC

Clinton, J. not

Teague, J. dissents. See dissenting opinion in Williams v. State, No. 67,147, October 14, 1981.

SUSAN JEAN PACE HERNDON,

the prspective Juror, answered to questions propounded as follows:

DIRECT EXAMINATION

BY MR. ADCOCK:

Q This is Susan Jean Herndon, is that correct?

A Yes, sir.

Q Is that Mrs. Herndon?

A Yes, sir.

Q Mrs. Herndon, you have been called to serve as a prospective Juror in a Capital Murder case. The punishment for Capital Murder in the State of Texas is a mandatory sentence of life or death. Do you have any objection to the death penalty as a punishment for crime in a proper case? A proper case is one where the law provides for it, which it does in Capital Murder, and where the facts of that particular case justify the Jury inflicting the death penalty.

A I don't -- no, I don't believe in the death penalty at all.

Q Has this been a long-standing belief against the death penalty that you have?

A Yes, sir.

Q And I take it that there is nobody that can sway you from your belief at this time?

A No, sir.

Q The death penalty is not an enjoyable situation, and I take it from what you tell us that regardless of what the facts and circumstances may be in a Capital Murder case, you as a Juror could never impose the death penalty, regardless of what the facts may show during the trial?

A No, sir.

Q As you sit here in the Courtroom today, would you automatically vote against the imposition of the death penalty no matter what the trial may reveal?

A Yes, sir.

Q You would not ---

A I would vote against it.

Q All right. As you sit here today, are you irrevocably committed, before trial, to vote against the death penalty regardless of the facts and circumstances?

A You will have to explain that.

Q As you sit here now, a lot of these words are not known -- as you sit here today, are you irrevocably committed, before trial, to vote against the death penalty regardless of the facts and circumstances that might emerge during the trial?

A I would vote against the death penalty.

Q Regardless of what those facts may be?

A Yes, sir.

MR. ADCOCK: We challenge, Your Honor.

MR. TINKER: May I ask her a question?

THE COURT: Uh-huh.

CROSS-EXAMINATION

BY MR. TINKER:

Q I'm Douglas Tinker, and I want to ask you some questions. I will admit that I'm going to try to get you to agree that there are some cases where you think that the death penalty is possible.

Is there any way that I can do that?

A No, sir.

Q How did you arrive at the belief that you have, what is it?

A That is just my personal feeling. That is the way that I have been brought up, and I just don't believe that that is necessary.

Q I'm going to ask you a question that is in the law books: Despite the convictions that you have, can you put those aside, if you were on this Jury, and do your duty as a citizen? Despite what your personal convictions may be, could you set those aside and serve, and do your duty as a Juror in a Capital Murder case?

A Yes, I could do my duty as a Juror.

Q All right.

MR. TINKER: That is all I have.

THE COURT: That is all?

MR. TINKER: Yes.

THE COURT: Okay. I'll sustain the challenge.

MR. TINKER: Your Honor, I would like to object to her being excused for cause. I object to her being excused. I understand that the Court is doing it under the Witherspoon test. I suggest to the Court that Burns versus Estelle -- the question that I just asked her qualifies her as a Juror in this case, and I object to her being excused.

MR. LINEGARGER: Your Honor, we submit he didn't ask the second predicate question in Burns: In doing your duty as a Juror, if it meant sentencing a man to death, could you follow that duty.

He just asked her if she could do her duty as a Juror, which is just a general question.

THE COURT: Okay. I will sustain the challenge. You may be excused, Mrs. Herndon. Go back to the central Jury room, and don't tell anybody what you have heard here.

MRS. HERNDON: Okay. Thank you.

THE COURT: Richard Longoria.

Q Have you -- since you have been summoned to appear, have you seen anything about this case on television or read anything in the newspapers about it?

A No, I haven't.

MR. TINKER: That is all I have.

MR. ADCOCK: The State will accept the lady.

MR. TINKER: Your Honor, we will exercise a peremptory challenge as far as she is concerned.

THE COURT: Okay. You are excused, Mrs. DeLeon. You may report back to the central Jury room, and don't discuss what you have heard here. Thank you.

ZENON MARTINEZ, JR.,

the prospective Juror, answered to questions propounded as follows:

DIRECT EXAMINATION

BY MR. LINEBARGER:

Q You are Zenon Martinez, Jr.?

A Yes, sir.

Q Mr. Martinez, my name is John Linebarger, and I'm Assistant District Attorney from Fort Worth, Tarrant County, Texas. And, I represent the people of the State of Texas, along with Mr. Rufus Adcock, who is also Assistant District Attorney from Fort Worth, and Mr. Tolly Wilson. The

Defendant in this case is represented by Mr. Travis Peeler, the first one on your right; Mr. Douglas Tinker, in the center; and Mr. John Anderson, on the end. And, I would like to ask you if you know any of the six attorneys that are seated here around this table?

A No, sir.

Q And seated behind the defense Counsel is Mr. Henry Martinez Porter, in the yellow shirt. I'll ask you if you know Mr. Martinez Porter?

A No, sir.

Q And Mr. Henry Martinez Porter comes from San Antonio, and would you know any of his family?

A I don't think so.

Q I notice here that you have never had any Jury service before; is that right?

A That is right.

Q All right. And, in all probability, you are kind of in the dark as to what is going on in here. This is called a voir dire examination. And what both sides are trying to do is select twelve fair and impartial Jurors to sit in this Jury box and hear the case of The State of Texas versus Henry Martinez Porter. And, during this voir dire examination, both sides are allowed to ask you questions so we can know your feelings about the law and about the death

penalty and certain other issues. Now, there are no right or wrong answers. And anything that we ask you, we are not trying to pry into your personal life or test your civic-mindedness, by any means. The only thing we are trying to do is get your basic feelings about certain areas of the law. Okay?

A Okay.

Q As I told you a minute ago, this is a death penalty case. Our law provides that if a person knowingly and intentionally causes the death of an individual, an intentional killing, that is murder. It goes one step further and it says if that individual killed is a police officer, a peace officer, and he is in the lawful discharge of his duties, and the person that killed him knew that he was a policeman, then in that event it becomes a Capital Murder. Do you follow me on the distinction?

A Yes.

Q If an individual is found guilty of the offense of Capital Murder, there is only two possible punishments. That is mandatory life or a mandatory death sentence. Since there is a possibility in this particular case that a death sentence may be involved, I'm going to ask you: Do you have any objection to the sentence of death for a Capital Murder in a proper case, a proper case being a case where the law

provides for it, such as a police officer killing, and one the facts so justify. Now, I'll ask you, based on that, do you have any objection to the imposition of death?

A Is that all he is going to get?

A I beg your pardon?

A Is that all he is going to get, is death sentence?

A Is that all he could get?

A Yeah.

Q If an individual is convicted of Capital Murder, it will either be life or death. There is no range of punishment. It will be one of the two, either life or death.

A No, I don't have no objection.

A I'm sorry?

A No, I don't have no objection.

Q You have no objection to the death penalty, and you could sit on the Jury and if the facts so warranted, you could sentence a man to death?

A No, I couldn't.

Q You could not. Have you given any thought ---

MR. TINKER: Your Honor, excuse me. Of course, he is not going to have to sentence a man to death. All he is going to have to do is answer the questions. I think it ought to be explained in those terms.

THE COURT: Overruled.

BY MR. LINEBARGER:

Q You could not sentence another fellow human being to death?

A No, I couldn't.

Q You are pretty strong on that belief; is that correct?

A Yes, sir.

Q Like we said, there are no right or wrong answers. We are just trying to see how you feel. And I take it, then, that you would vote against the death penalty, regardless of what the evidence showed based on ---

MR. TINKER: Again, he is telling him what his answer is, and not asking him. I request that he be questioned and not say, "I take it that you would do so."

THE COURT: Sustained.

BY MR. LINEBARGER:

Q Would you then vote against the death penalty, regardless of the facts ---

A Yes, sir.

Q --- based upon your personal belief against the death penalty?

A Yes, sir.

Q And, your personal belief against the death penalty is such that even though the facts and circumstances ---

MR. TINKER: Your Honor, again, he is telling him, "Your personal belief is such." It is not a question; it is a statement.

THE COURT: Sustained.

BY MR. LINEBARGER:

Q Is your personal belief such, then, that you would be -- your vote would be committed, before you even heard the facts, to vote against the death penalty? In other words, are you going to change your mind, or are you pretty firm in your belief against that death penalty?

A Yes, sir.

Q Regardless of what the facts may show?

A Yes, sir.

Q And that you couldn't take another person's life?

A No, I couldn't.

Q Now, in the event that you were chosen to serve on this Jury, Jurors answer three questions during the punishment phase, and both sides are allowed to present evidence to help you make this decision. There are two, and sometimes three, questions. The answers to these questions depend, or rather the sentence in this case would depend upon your answers to the questions. If you answered all of

the questions "Yes," it would automatically sentence the man that is being tried to death. If one or two were answered "No," it would automatically sentence him to life. The first question is: Whether the conduct of the Defendant that caused the death of the deceased was committed deliberately with the reasonable expectation that the death of the deceased, or another, would result. In other words, was it a deliberate act? Did the person reasonably expect that the death of the deceased would result? Do you understand that question?

A I didn't understand it.

Q All right. There are three questions. If all twelve Jurors, and you as one of them, were going to answer those questions "Yes," it would automatically sentence a man to death. Now, knowing, even though you have heard evidence, but knowing that voting "Yes" to all three questions would sentence a human being to death, would that influence your deliberations, knowing that answering the question "Yes" would sentence a man to death?

A What does that word mean, deliberate?

Q I beg your pardon?

A What does it mean?

Q Deliberate? That means when people from the Jury go back into a room back here among themselves and talk about

the case after all of the testimony is over. Would you automatically vote "No" to one of these questions?

A Yes, sir.

Q Because you didn't want to sentence a man to death, regardless of what the facts and the evidence show?

A [Juror nods affirmatively.]

Q Based upon your personal belief against the death penalty?

A [Juror nods negatively.]

Q Would you speak up, please.

A Yes, sir.

Q Then, I take it that you are irrevocably, and that means you are positively not going to change your mind, committed to vote against the death penalty?

A Yes, sir.

MR. TINKER: Your Honor, again, he is making a statement, and not asking a question. He is saying I take it ---

THE COURT: Sustained.

BY MR. LINEBARGER:

Q Are you committed against the death penalty?

A Yes, sir.

MR. LINEBARGER: We challenge, Your Honor.

MR. TINKER: May I ask a question, Your Honor?

CROSS-EXAMINATION

BY MR. TINKER:

Q Mr. Martinez, it is inconvenient for people like yourself to come down and participate in a Jury trial. It is -- generally it costs people money, working people money, but do you recognize that citizens have a duty to come down and ---

MR. ADCOCK: Your Honor, we are going to object to the duty of a citizen.

THE COURT: Sustained.

MR. TINKER: Your Honor, the case styled Vernon versus Estelle in talking about the qualifications with regard to the belief of the death penalty speaks directly do the duty of a citizen, and it is my intention to ask this young man about that. And, I will refer the Court to page 13 -- 4131 of that case. It is a case dealing directly with the Witherspoon question, and I would submit to the Court that I have a right to go into this man's feeling concerning his duty as a citizen.

THE COURT: Well, he doesn't have any duty to vote for or against the death penalty.

MR. TINKER: That wasn't the question that I was asking.

THE COURT: Well, ask the whole question, and I will rule on it.

BY MR. TINKER:

Q Do you understand that citizens of the community have a duty to come down and serve if they qualify as a Juror?

A Yes, sir.

Q You understand that. Do you feel like that is an important duty in our society?

A Yes, sir.

Q Now, I'm not telling you that you should answer questions any way that you don't believe they should be answered. Okay?

A Yes, sir.

Q But, you understand that if a person qualifies, he should serve, if he is accepted by the people participating in the trial. Do you understand that?

A Yes, sir.

Q Are you willing to do your duty as a citizen as far as serving on a Jury is concerned?

A Yes, sir.

Q In a case, the law is what you are bound to follow, if you are a Juror. Do you understand that?

A Yes, sir.

Q You may have -- some people have a disagreement with some portions of our law, but in doing their duty as a citizen and serving on juries; they may be able to set aside their personal feelings and follow the law in doing their duty as a citizen. Do you understand that?

A Yes, sir.

Q And so, first, I want to ask you: Are you willing to do your duty as a citizen and follow the law as it is given to you by Judge Gray, who is the presiding Judge in this Courtroom? Are you willing to do that?'

A Yes, sir.

Q And, you have an expressed conviction, that means a -- expressed a belief against the infliction of the death penalty as punishment for crime. You have told us that in answering the prosecutor's questions, and is that true? You do have an expressed feeling that you would not want to inflict that kind of punishment?

A Yes, sir.

Q What I want to ask you is: Can you set aside your expressed convictions and your disbelief in the death penalty and do your duty as a citizen on this Jury?

A No, sir.

MR. LINEBARGER: Your Honor, we object to that -- I withdraw the objection.

THE COURT: What was your answer?

THE REPORTER: No, sir.

BY MR. TINKER:

Q What effect would the possibility of the death sentence have on your deliberations in this case? How would it affect you? Could you explain that to us?

A Well, I would just have it on my conscience.

MR. LINEBARGER: Your Honor, He has answered the challenge question, and we renew our challenge.

MR. TINKER: Is that the objection to the question?

THE COURT: I will sustain the objection, and the challenge is sustained. Okay.

MR. TINKER: The Court will not permit me to ask what effect ---

THE COURT: Well, he is clearly not qualified to serve, so ---

MR. TINKER: I want the record to reflect -- will the Court not permit me to ask what effect the presence of a possible death penalty would have on his deliberation? The Court will not permit that question?

THE COURT: I will let you ask that question.

BY MR. TINKER:

Q What effect would the presence of a possible death sentence have on your deliberations on this case? How would it affect you?

A I never killed anybody before.

Q Would it cause you to ---

A I would just have it on my conscience, that is all.

Q You would have it on your conscience?

A Yes, sir.

Q And, you would be worrying about it as you decided what the facts were in the case?

A Yes, sir.

Q All right. Would that prevent you from making a decision as far as the facts are concerned, or would it just be something that concerned you as you decided those facts?

MR. LINEBARGER: Your Honor, we object. It is repetitious, and we renew our challenge.

THE COURT: I told him to ask that question. The challenge is sustained.

MR. TINKER: Your Honor, I would like the record to reflect that we object to Mr. Martinez being excused. We feel he is qualified, and not disqualified under the Burns or Witherspoon.

THE COURT: Okay. You may be excused, Mr. Martinez. Go back to the central Jury room. Don't talk about what you have heard here.

MR. MARTINEZ: Where to?

THE COURT: Back to the Jury room, fourth floor.

We will take a short recess.

[A short recess is taken.]

H. R. BRUNNER,

the prospective Juror, answered to questions propounded as follows:

DIRECT EXAMINATION

BY MR. ADCOCK:

Q This is Mr. H. R. Brunner; is that correct?

A Correct.

Q Mr. Brunner, I see that you are from Fayette, Texas. Where is that located?

A In Fayette County., It is about halfway between San Antonio; that is where I was born. I haven't been there in forty-five years.

Q My name is Rufus Adcock, and I'm from Fort Worth, up in Tarrant County, and I'm in the District Attorney's office up there, and I will be representing the State of Texas in this lawsuit, along with Mr. John Linebarger here

DIRECT EXAMINATION

BY MR. ADCOCK;

Q This is Alonzo Vaughn; is that correct, sir?

A Yes, sir.

Q Mr. Vaughn, my name is Rufus Adcock. I'm from up in Fort Worth, Tarrant County. I'm Assistant District Attorney up there. And, along with Mr. John Linebarger of our office, we will represent the State of Texas in the prosecution of this case. You have been called to serve as a prospective Juror in a Capital Murder case. We would like to ask you some questions, and it is not a test as to whether or not you are a law-abiding citizen or anything like that. We are all presumed to follow the penal code. We would like to know some of your feelings as to punishment, particularly the death penalty, as well as to certain laws of evidence that might be brought forth in the trial of this case and given to you by the Judge to follow, if you can. But, there is nothing here that says that you must, or you are not a good citizen if you don't. It is just how Mr. Vaughn feels about it right now as we are sitting here talking.

As the name implies, Capital Murder in Texas has a mandatory punishment of life in the penitentiary or death. My first question to you, sir, is: Do you have any objection

to the death penalty as a punishment for crime in a proper case? A proper case is one where the law provided for it, which it does in Capital Murder, and where the facts of that particular case justify the Jury voting for the infliction of the death penalty?

A Well, I don't believe in the death penalty.

Q I see. And, you have had this feeling against the death penalty for a long time?

A Well, during all of my experiences of -- saying, this is like I feel, okay?

Q Sure. That is what we want to hear.

A I'm a church-going man, so, in other words, my hesitancy is that God paid the price for us all, so I base mine on that.

Q I take it that you have had this feeling for a long time, against the death penalty?

A Since I learned the meaning of the Word of God. Now ---

Q And, you notice I said in a proper case? As you sit here today, can you think of a fact situation in a Capital Murder case where you, as a Juror, could vote for the infliction of the death penalty?

A No, I couldn't vote for it.

Q Regardless of what the facts may show?

A You rise a question.

Q Yes, sir. Let me ask you this, and I have to ask you these questions because the law provides for it, and I'm not trying to pry, and you just speak out.

A Fine, fine.

Q Are you telling me that regardless of the facts of the case, you could never vote to impose the death penalty?

A Well now, if it was just, say, if it was just, say; if this is twenty years, it could have been a whole new ball game.

Q I'm talking about right now.

A Right, I couldn't.

Q You could never vote for the death penalty, period. Is that what you are telling me?

A That is what I'm saying.

Q And if you were called upon to serve as a Juror in a Capital Murder case, would you automatically vote against the death penalty, regardless of what the facts might show during the trial of the case?

A I would.

Q You would automatically vote against it?

A Vote against it, the death penalty.

Q And you have had this commitment for some time against the death penalty, and you are not going to change

your mind.

MR. TINKER: Your Honor, he is telling him.

MR. ADCOCK: I will withdraw the question.

MR. VAUGHN: Well, I don't know. It is how I feel at this time.

BY MR. ADCOCK:

Q What we want to know is how you feel at this time. Mr. Vaughn, I would like to ask you a few more questions. I understand you, but I want to make sure the record brings it out as to what your feelings are against the death penalty. As you sit here right now, would you vote against the death penalty, regardless of the facts and circumstances that might come forth in the course of this trial?

A Now I would; certainly, I would.

Q Now, in Texas, the Jury does not say life or death in a Capital Murdor case. In effect, what the Jury does to determine whether or not the Judge would pronounce the death penalty is answer two questions, and sometimes three questions. If the Jury answers those questions "Yes," then the Judge must, under the law, pronounce the death penalty.

A I realize that.

Q Therefore, you might say that a "Yes" vote to those

questions means death. In taking what you have told me about the death penalty, would you automatically vote "No" to those questions, knowing that a "Yes" vote would be a mandatory death sentence?

A It's still a death sentence. I'm still of the same opinion.

Q So, you would vote "No" to those questions, regardless of what the facts ---

MR. TINKER: Again, he is telling him, and not asking him, and I object to him telling ---

THE COURT: Sustained.

BY MR. ADCOCK:

Q Then, because of your feeling, would you then be forced to vote "No" to those questions, knowing that a "Yes" vote would be an automatic death penalty?

A Well, at this time, I would have to say I would vote "No" at this time.

Q Regardless of what the facts may show?

A Regardless; I don't know any more than I have heard at this time.

Q We are not trying to commit ---

A You know, what I'm saying, that is my feeling. I would not vote for the death penalty, is my feelings now.

Q I think that you are very definite in that.

the Jury. Now, if there is any publicity on this -- it will be a few days before we finish picking the Jury, so during that time, if there is any publicity, don't follow any of the publicity, and don't discuss what might purport to be the facts with anybody, and that includes your husband.

If you will, go back down to the central Jury room and tell them down there that you are on the Jury. Then, we will call you when we are ready to start the trial.

MRS. BUCKLEY: Okay. Thank you.

THE COURT: We will take a short break.

[A short break is taken.]

ESIQUIO CANTU,

the prospective Juror, answered to questions propounded as follows:

DIRECT EXAMINATION

BY MR. ADCOCK:

Q This is Mr. Cantu?

A Yes, sir.

Q Mr. Cantu, I see that you are self-employed; is that correct, sir?

A Yes.

Q And what kind of business are you in?

A Well, I'm a concrete finisher.

Q I see. And, you go out and contract and work concrete?

A Yes, sir.

Q Are you paid by the job or by the hour?

A Sometimes by the hour; sometimes by the job.

Q I see. In other words, you do not work for a company that, while you are on Jury duty, they are paying you?

A No.

Q I see that you have seven children.

A Yes, sir.

Q What are their ages?

A From twenty-two down to seven. You want all of them?

Q Down to what?

MR. TINKER: Down to seven.

BY MR. ADCOCK:

Q Seven. Okay. There is a likelihood that this case will last more than a week in length. I was wondering, have you made provisions for your family, or would serving on this Jury for a long period of time cause you any financial detriment?

A Sure will.

Q Is that detriment such that it would cause you to worry about your family, your financial status to -- of course, we all have that problem -- but, to the degree that you could not concentrate on the trial?

A Probably will.

Q Would your mind, then, be such ---

MR. TINKER: Your Honor, excuse me. I'm going to object to this inquiry. It does not go to challenge.

THE COURT: Sustained.

MR. ADCOCK: May I approach the bench?

THE COURT: No. What is sauce for the goose is sauce for the gander.

MR. ADCOCK: No, Your Honor. I thought I was going into a particular case law that I'm familiar with.

THE COURT: No. I'm not going to excuse him because of hardship. I can't, unless both sides agree.

BY MR. ADCOCK:

Q Mr. Cantu, I see that you were raised here -- were you raised here in Corpus Christi?

A No, I was raised in Brooks County.

Q In Brooks County. And, did you go to school there?

A Yes, sir.

Q I see. I'm not really familiar -- is that down in this particular area, Brooks County?

A Falfurrias, Texas. Do you know where that is?

Q Yes. Did you go to school there in Falfurrias?

A Encino, Texas, that is where I went.

Q I see. You have been called to serve as a prospective Juror -- one other thing. I see that you put down here that you have got a back injury from a wreck; is that correct?

A No, injuries where I work.

Q I see.

A Jobs.

Q Was that some time ago, or was that recently?

A No, it was -- it has been quite a bit of time ago.

Q Does it bother you at this time?

A Yes, sir. I was supposed to be -- I had an appointment with the doctor yesterday.

Q Yesterday?

A Very important, yes, sir.

Q I see. Are you in any pain at this time, or taking medication?

A No, but I'm in pain.

Q You are in pain?

A Yes, sir.

Q Did you go see the doctor yesterday?

A No, they wouldn't let me.

Q Because of this case?

A Right.

MR. ADCOCK: Would the Court like to take over at this time?

THE COURT: No.

BY MR. ADCOCK:

Q Is this pain that you have, do you feel that you should receive immediate medical attention at this time?

A Well, I don't know, but the doctor said over in Bishop, you know, doctor that I'm seeing in Bishop, he says it is supposed to be taken care of pretty fast, pretty quick, you know.

Q Is the pain that you have at this time, is it such that it would prevent you from paying attention to the testimony, or could you sit over here and listen to the facts of the case and be fair to both sides?

A Well, it bothers me when I sit a long time; sure does. But, well, it depends on how long we are sitting.

Q I think the Court will probably give us a recess about every couple of hours or so, or something like that.

MR. TINKER: Your Honor, I believe it will be

more often than that.

THE COURT: Probably so.

BY MR. ADCOCK:

Q Mr. Cantu, you have been called to serve as a prospective Juror in a Capital Murder case, and we would like to ask you some questions about it. We are not asking you questions pertaining to our penal code, which we all must follow as a course of conduct to our fellowman. But, we are going to ask you questions pertaining to punishment, and your feelings about it. It is not a test as to whether or not you are a law-abiding citizen, because we each and everyone of us have our own opinion as how we feel about certain things. This pertains to rules of evidence, rules of law, but not to the penal code, and punishment -- in particular, the death penalty. We would like to know, as you sit here today -- as you sit here today, just how you feel yourself about this law, and whether or not you agree with it or disagree with it. If I get too far afield, or I get too technical like a lawyer, will you just back me up and let me try to do it better? Okay.

Capital Murder, as the name implies, is punishable with a mandatory sentence of life or death. My first question to you is: Do you have any objections to the death penalty as a punishment for crime in a proper case?

A Can you repeat that again?

Q Certainly. As you sit here right now, do you have any objections to the death penalty? The Jury, in Texas, in effect, assesses the punishment of life or death in a capital case. So, I would like to know how you feel about it. And, do you have any objections or disagreement, prejudice or bias against the death penalty in a proper case? A proper case is one where the law provides for it, and where the facts of that case justify the Jury voting for the death penalty.

A Well, I'm against [illegible].

Q You are against the death penalty?

A Yes, sir.

Q All right. Of what religious affiliation are you?

A Pentecostal.

Q Is it part of your religious belief?

A Yes, sir.

Q I take it that you have had it for sometime?

A Yes, sir.

Q Now, notice I said that it was a -- in a proper case.

A Uh-huh.

Q That is one where the facts justify. As you sit here right now, is your feeling against the death penalty

such that you could never impose the death penalty, regardless of what the facts are?

A That is right, yes, sir.

Q You could never impose it?

A [Juror nods negatively.]

Q And, if you were on a Jury, would you automatically take away from your thinking the death penalty when you determine punishment, regardless of what the facts were, because of your belief against the death penalty?

A Yes, sir.

Q Okay. Now, in Texas, the Jury does not say death or life. They answer three questions. If they answer those questions "Yes," then, under the law, the Judge would pronounce the death penalty automatically. In effect, "Yes" means the death penalty. Is your feeling such against the death penalty, and because of your religious belief, that you would have to answer all of those questions "No," regardless of what the facts were and what were presented to you?

A Well, I probably have to answer "No."

Q You know, in good, polite society, we say, "Probably," but you probably know, but can you be more definite and just say "Yes" or "No"?

A No.

Q Then, I take it that as you sit here today, because of your belief against the death penalty, you are committed right now, before trial, to vote against the death penalty, regardless of the facts and circumstances that might be brought forth during the trial. Is that correct?

A Correct, yes, sir.

MR. ADCOCK: We challenge.

MR. TINKER: May I ask him a question?

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. TINKER:

Q Mr. Cantu, I want to ask some questions dealing with this very similar thing. Do you feel like that a citizen of this community has a duty to serve on a Jury?

A Sir?

Q Do you feel like a person who lives in this community has a duty, if they are called, to serve on a Jury?

A Do I feel -- what was the question?

Q That you have a duty to serve on a Jury ---

A Oh, yeah.

Q --- if you qualify.

A Yes, sir.

Q And, while nobody likes to have to come down, if you get called, you have got to do it.

A Yes, sir.

Q And, in this particular case, you have been asked questions about how you feel about the death penalty. The question that I want to ask you: Can you, I know that you say that you have expressed convictions against the death penalty. But, can you, despite your expressed conviction, the way that you feel about the death penalty, put that aside, and do your duty as a citizen in serving on this Jury, and answer whatever questions you are required to answer, based upon the facts. Can you do that?

MR. ADCOCK: Your Honor, at this time, we would object to "doing his duty." The law does not require a man in the guise of duty to do something that he cannot do because of his own beliefs. For that reason, we object.

THE COURT: Sustained.

MR. TINKER: Your Honor, I would submit that I have the right to ask that question, but I will abide by the Court's ruling.

BY MR. TINKER:

Q What affect would the possible punishment of death have on your service on this Jury? How would that affect you in making your decisions?

A I don't understand the question.

Q If you are on a Jury -- have you ever been on a Jury before?

A No, sir.

Q You will end up, if you got on a Jury, you would sit over here and you would listen to witnesses that would be sitting where you are sitting. Do you understand that?

A Yes, sir.

Q You would have to decide what you thought was the truth and what was not the truth in making decisions.

A Right.

Q Do you feel like you could do that in a case like this one? Sit over there and listen to the facts and make a decision about what the facts are?

A Well, I can do that, yes.

Q And, honestly say, if you felt a man was guilty of the crime charged, could you honestly find guilty if the evidence convinced you that he was?

A Well, I can't say he is guilty because I didn't see -- I mean, I didn't see him do nothing wrong.

Q Okay. What I'm saying -- if you listen to the evidence, and if you were convinced that he was, after you heard everything, you know, you heard all of the evidence in the case, and believed that he done it, could you say so? That is all I am asking?

A No, I don't think so.

Q Well, are you telling us that you haven't heard the evidence yet?

A Yeah. I will hear it and everything, but, I don't know.

MR. TINKER: That is all of the questions I have, Your Honor, and I would object to the Court releasing this Juror for cause.

THE COURT: I will sustain the challenge and release the Juror. You may go back to the central Jury room.

MR. TINKER: I do object, also, Your Honor, for the Court failing to allow me to ask the question concerning the duty of a Juror.

THE COURT: Okay.

DOVIE JORDAN,

the prospective Juror, answered to questions propounded as follows:

DIRECT EXAMINATION

BY MR. ADCOCK:

Q This is Mrs. Dovie Jordan?

A Right.

Q Mrs. Jordan, my name is Rufus Adcock, and I'm from up in Fort Worth, Tarrant County, Texas, the District

THE COURT: Overruled.

MR. TINKER: Note my exception, Your Honor.

MR. LINEBARGER: Did you rule on the challenge?

THE COURT: Pardon?

MR. LINEBARGER: Did you -- were you waiting for us?

MR. TINKER: He overruled the challenge for cause.

MR. ADCOCK: We accept the lady, Your Honor.

MR. TINKER: Your Honor, I would exercise a peremptory challenge, but would show the Court that it is my position that the Court is incorrect in his ruling on my challenge for cause, and will be requesting additional challenges because of the error of the Court's ruling.

THE COURT: Okay. Okay, you may be excused, Mrs. Pickett, and you are free to go home.

We will take a short break.

[A short break is taken.]

BETH PRUE,

the prospective Juror, answered to questions propounded as follows:

DIRECT EXAMINATION

BY MR. LINEBARGER:

Q You are Mrs. Beth Prue?

A Right.

Q Mrs. Prue, my name is John Linebarger, and I'm an Assistant District Attorney from Fort Worth, Tarrant County. And, myself, along with Mr. Rufus Adcock, who will be in in a minute, and he will be seated right here, he and I will be representing the State of Texas in this case. The Defendant, seated over there in the plaid shirt, is Mr. Henry Martinez Porter. Do you know Mr. Porter?

A No, I don't.

Q Mr. Porter is represented, first, by Mr. Travis Peeler, Mr. Douglas Tinker, in the beard, and Mr. John Anderson on the end. I will ask you if you know the lawyers for either side?

A I know their names from hearing and reading.

Q Mr. Tinker and Mr. Peeler.

A That is all.

Q Have you ever heard of Mr. Anderson?

A I don't believe I have.

Q Have you ever had any dealings with Mr. Tinker and Mr. Peeler? Have they ever represented you or any of your friends?

A No.

Q Well, there is nothing, I take it, in that relationship that you haven't heard of that would make you go toward one side or the other.

A That is right.

Q You have never had any Jury service before; is that right?

A Right, and I'm as nervous as a cat.

Q I bet you are. Okay. Let me try to put you at ease a little bit, and tell you that since you have never been up here and been through this Jury experience before, since this is a Capital Murder case where death is a potential verdict, or possible verdict, both sides have an opportunity to talk to each prospective Juror, and soon as I get through talking with you, one of the lawyers for the defense will talk to you. When we do talk to you, there are no right or wrong answers, and this is not a test of any sort. We just want to know your feelings about certain areas of the law and the death penalty. That is our whole purpose of talking to you. We talked to several people before you, and I bet everyone of them was just as nervous as you are now. Okay?

I see that you have two children. What are their ages?

A. Twenty-four and twenty-six.

Q. Are they gone away from here now?

A. Right.

Q. And, your husband has been with Menger Olds-Honda for eighteen years?

A. Correct.

Q. Does he drive an Oldsmobile or Honda?

A. Naturally, Oldsmobile.

Q. Okay. And, you have never -- strike that. Have you ever been the victim of a crime, or any close friends or loved ones ever been the victim of a crime?

A. Never.

Q. Have you ever followed any particular criminal case that caught your interest other than something that you may have seen in the newspapers?

A. Other than the newspaper?

Q. Yes, ma'am.

A. Or TV? No.

Q. Then I take it this is the first time that you have ever been inside a Courtroom?

A. Correct.

Q. Okay. In the case that you have been called as a prospective Juror on, is a Capital Murder case. Upon conviction for the offense of Capital Murder, there are only

two possible punishments. It is mandatory by law, and that is either life or death. Let me explain to you that our law provides that if a person knowingly and intentionally causes the death of another individual, that is murder. And it goes a step further and says if that person that got murdered was a fireman or policeman in the discharge of his duties, that it becomes a Capital Murder. Capital Murder -- when it comes to killing a fireman or policeman in the line of duty; also, a murder committed during the course of a robbery, rape, burglary or arson, or murder for hire, contract killing.

Since there is a mandatory punishment of life or death, we lawyers need to see your views upon the death penalty. So, my first question to you would be: Do you have any objection to the assessment of the death penalty in a proper case, a proper case being one in which the law provides for it, and it does in Capital Murder, and a case in which the facts justify the imposition of the death penalty?

A Well, I do not believe in capital punishment.

Q Okay. And, like I told you, there are no right or wrong answers. You know, it is just however you feel in your heart and within yourself. You don't believe in capital punishment?

A Right.

Q Okay. Then, I take it, you would automatically vote against the assessment of the death penalty, regardless of what the facts or evidence may show?

A [Juror nods affirmatively.]

Q Because that is your conviction.

A Right.

Q Have you held this conviction for a long time?

A Yes, I have. Now, of course, we are referring to one case.

Q We are referring to Capital Murder.

A To Capital Murder.

Q In general.

A So, I have held that conviction for some time.

Q As we talk now, we are not talking about The State of Texas versus Henry Porter. We are talking about the death penalty in Capital Murder ---

A Right-

Q --- in general. And, you have held this viewpoint against the death penalty or Capital punishment for a good while? Is this based on a religious conviction or just your own personal convictions?

A My own personal.

Q Okay. Then, I take it that regardless of what

the facts or evidence may show in the case, you are irrevocably against the assessment of the death penalty?

A I'm afraid so.

Q Let me go a step further and explain to you that during a Capital Murder case when it comes down to the punishment hearing on what to do if the guy, if the man is found guilty, how he is sentenced to life or death. The Court will give the Jurors three questions, and the first one is: Whether -- well, we won't go into the exact questions. The first question -- I'm sorry. The first question goes to the effect of did the Defendant deliberately kill the person, and did the conduct of the Defendant that caused the death, was that deliberate, and did the person the Defendant -- strike that. Let me back up. I've just confused myself.

MR. TINKER: Do you want me to ask it?

BY MR. LINEBARGER:

Q The first question is: Whether the conduct of the Defendant that caused the death of the deceased was deliberate and he reasonably expected somebody to die. The second question is: Whether there is a probability that the Defendant would commit criminal acts of violence and be a continuing threat to society. The third one was: Whether or not there was any provocation, and if there was, was the Defendant's conduct in killing the deceased

unreasonable. The Jury will be asked to answer those three questions. Both sides are allowed to present evidence as to the proper answers, and the Jurors can take into effect the evidence on the first hearing of guilt or innocence.

A "Yes" answer to all three questions -- the Jurors, if you are selected on this Jury, if you and the other eleven people answered all three questions "Yes," the Judge would automatically sentence the man that you were trying to die. If one were answered "No," he would automatically sentence him to life. But, if all three are answered "Yes," then the Judge, under the law, has to automatically sentence a man to death.

So, my question would be: Based on your strong belief of against the death penalty, and the imposition of it, would you, regardless of the facts and circumstances, vote "No" to at least one of those questions to avoid sentencing a man to death?

A Yes.

Q And, is it your firm belief, based on your convictions against the death penalty, the assessment of death, that you would not vote "Yes" on all three, regardless of the facts? You would not vote "Yes" to prevent sentencing a man to death? In other words, I'm going to ask you just the opposite. The last time you told me you would vote "No"

to avoid sentencing a man to death, and right now, I'm saying: Would you avoid voting "Yes," regardless of the facts and evidence, to avoid sentencing a man to death?

A I'm getting all confused.

MR. TINKER: The same question; just say "No," again. Say what you said the last time.

BY MR. LINEBARGER:

Q In other words, are you going to vote on these questions to avoid sentencing a man to death?

A Yes.

Q Okay. And, you are firm in those convictions and your beliefs?

A Right.

Q And, you are irrevocably committed before trial to this conviction and belief that you have, regardless of what the evidence may be in the case?

A Correct.

MR. LINEBARGER: We challenge, Your Honor.

MR. TINKER: May I ask some questions?

CROSS-EXAMINATION

BY MR. TINKER:

Q They told you there were no right or wrong answers. That was probably wrong, as far as I'm concerned, but I want to ask you some questions about your feelings als

Have you -- you have never served on a Jury?

A Right, I haven't.

Q If this was not a death penalty case, would you feel like you could serve on a Jury?

A Right.

Q You recognize then the duty citizens have to come down here when they are summoned and do their job as a citizen?

A Right.

Q My question to you, and I will ask it in a specific way, is: whether or not you can, despite your expressed conviction, can you, and your disbelief in the death penalty, could you set those aside, if chosen on this Jury, and do your duty as a citizen and decide the facts as they were presented to you?

A On this ---

Q Yes.

A --- this particular ---

Q In a murder case.

MR. LINEBARGER: Your Honor, I'm going to object to that. He never finished the last part of the predicate knowing the possible punishment is death. He just -- can you do your duty and answer questions -- anybody is going to answer

"Yes" to that.

THE COURT: Sustained.

MR. TINKER: I pass the Juror, Your Honor.

THE COURT: Okay.

MR. TINKER: I do object to her being excused and I certainly object to the Court not permitting me to ask the question that I attempted to ask.

THE COURT: I'll sustain the challenge. You may be excused, Mrs. Prue, and you are free to go home. You don't have to go back to the central Jury room.

ROBERT CASARES,

the prospective Juror, answered to questions propounded as follows:

DIRECT EXAMINATION

BY MR. LINEBARGER:

Q You are Mr. Robert Casares?

A Yes, sir.

Q Mr: Casares, my name is John Linebarger, and I'm an Assistant District Attorney from Fort Worth, Tarrant County, Texas. My co-Counsel will be here in a minute. His name is Rufus Adcock. He will be right here. He is also an Assistant DA from up there. Together, he and I represent the people of the State of Texas in this criminal case styled:

DIRECT EXAMINATION

BY MR. ADCOCK:

Q Good morning.

A Good morning.

Q This is Mrs. Joyce Rice?

A Yes, sir.

Q Mrs. Rice, my name is Rufus Adcock, and I'm from Fort Worth, Tarrant County, Texas. Along with Mr. John Linebarger, who is not here right now, but I believe you met him earlier, we work in the District Attorney's office up there as Assistant District Attorneys, and this case has been brought down here from Tarrant County for trial. We will represent the State in the presentation of the State's case to the Jury.

This case is a Capital Murder case. Capital Murder is a murder that takes place under a limited fact situation. The murder must take place during the commission of a burglary, arson, rape, robbery or where a fireman or policeman are in the lawful discharge of their duties when they are murdered, or where the murder takes place for hire. Those are the limitations and requirements, the factual requirement that we have of Capital Murder.

The Defendant in this case, Henry Martinez Porter, is seated over there in the plaid shirt. He is indicted with

the murder of a Fort Worth police officer, Officer Henry P. Mailloux. Do you know the Defendant, by any chance?

A No, sir.

Q Did you know Officer Mailloux during his lifetime?

A No, sir.

Q The Defendant is represented by Mr. Travis Peeler from Corpus Christi, Mr. Douglas Tinker of Corpus Christi, and Mr. John Anderson, from Fort Worth. Do you know either of the prosecutors or the defense Counsel?

A, No, sir.

Q I see that you have two children.

A Yes, sir.

Q What are their ages?

A Fifteen and eleven.

Q You have a full time job of being a housewife; is that correct?

A Yes, sir.

Q And, your husband is with -- what is ECH?

A Equipment cleaner.

Q He is with Reynolds Metal Company.

A Yes, sir.

Q We would like to ask you some questions. It is not a test as to whether or not you are a law-abiding citizen. We are all presumed to follow the penal code and

be bound by it and follow it in our relationship with our fellow man. We are not asking you about whether or not you are a good law-abiding citizen, but we would like to ask you some questions pertaining to punishment and certain rules of evidence and law that might come forward in a case. The reason we are asking you that is, for the first reason, is that the Jury in Texas, in effect, determines the punishment in a Capital Murder case within the mandatory range of life or death. Secondly, if an issue is raised by either side, the Court will instruct you as to this law we are going to talk about as a guide. He is the judge of the law, and he is not commenting on you or telling you how to rule in your factual determination from the facts, because you are a judge of the facts. But, he will give you some law, and it can be raised by either side. He is just telling you what the law is when you apply the facts to a particular situation. For that reason, there are no right or wrong answers to these questions. It is just how you feel as you sit here right now.

As the name implies, Capital Murder has a mandatory punishment of life or death. Do you have any objections for the punishment of death in a crime in a proper case? A proper case is one where the law provides for it, which it does in Capital Murder, and too, where the facts of that

particular case justify the Jury voting for the infliction of the death penalty.

A Well, it is my opinion.

Q Yes, ma'am.

A Well, I think I agree with it, but I don't think like if I was on a Jury and we did pick, like, the death penalty, I don't think I could live with it, knowing that I was one of that Jury putting someone to death.

Q You could not do that?

A I couldn't do that. I would feel guilty.

Q All right. Now, this is just the way you feel.

A That is the way I feel.

Q Nobody is going to try to pressure you to change your mind. Because of this feeling, I take it that if you were on a Capital Murder Jury, and you had found the accused guilty beyond a reasonable doubt, when it came time for punishment that you would automatically exclude it from your consideration because of what it may do to you ---

A Yes, sir.

Q You would exclude the death penalty, regardless of what the facts may be; is that correct?

A I would assume, yes.

Q Now, in Texas, the Jury does not say life or death. The Jury does, in effect though, cause the death

penalty or the life sentence. Let me explain that to you.

A Yeah.

Q What they do, they answer, and are given facts during the punishment phase, as well as facts during the guilt phase, and from these facts, they answer three questions; sometimes two, sometimes three. If they answer those facts "Yes," automatically the Court pronounces the death penalty. You see? If they answer those facts "No," or one of those -- excuse me, one of those questions "No," or all of them "No," then the punishment is pronounced by the Court automatically as life. So, in effect, I think that you can see that a "Yes" answer means death.

A Yes.

Q And is your feeling such that -- in fact, let me go over some of those questions for you. One of them pertains to whether or not the Defendant, in causing the death of the deceased, that it was deliberate and with the reasonable expectation that the death of the deceased, or another, would result.

The other question is whether or not there is a probability that the Defendant would commit criminal acts of violence and be a continuing threat to society.

And, the other one is whether or not if there was any provocation by the deceased, was the conduct of the

Defendant in killing the deceased unreasonable in response to that provocation, if any.

Those are the questions. And, knowing now that a "Yes" answer to those questions, regardless of the facts, because of the way that you feel, would you be compelled to answer those facts and questions "No" because of what a "Yes" answer would do to you?

A Yes.

Q As you sit here right now -- I'm sorry that I have to keep asking you these questions, but it is necessary. Are you irrevocably committed before trial to vote against the death penalty, regardless of the facts and circumstances that might emerge in the course of the trial?

A Would you explain what you mean?

Q Irrevocably committed, that means as you sit right here that you are not going to change your mind, all right?

A All right.

Q Before the trial, that means before we start this case, that you would vote against the death penalty, regardless of the facts that may be presented to you during the trial. Is that your belief at this time?

A Yes, sir.

Q And you would not change ---

A I don't believe so.

Q A lot of times in polite conversation, we say, "I don't believe so." Could you give me a more definite . . . .

A I just don't think I could sentence anybody.

Q I'm sorry.

A I'm sorry.

Q That is quite all right. Just take a breath. We have certain degrees we must reach, and these were brought forth by law.

A I understand.

Q A lot of times in polite conversation, we say, "I don't think," or "I don't believe." Could you be more emphathic?

MR. TINKER: Your Honor, what she is saying is that she doesn't know, and that she is not sure of how it would affect her, and I think that is her answer. I don't think she should be required to be any more sure than she is.

THE COURT: Overruled.

BY MR. ADCOCK:

Q Let me ask you the question again. As you are sitting here right now, are you irrevocably committed, before trial, to vote against the death penalty, regardless of the facts that might emerge during the trial?

A I don't ---

MR. TINKER: May she know an "I don't know" answer is all right?

MR. ADCOCK: Now, Your Honor, I'm going to object to him trying to put words in the lady's mouth. She has told us how she feels, and that is all I'm trying to ask. The Court knows ---

THE COURT: Did she say "I don't know" again?

MR. ADCOCK: I don't think she ever ---

MR. TINKER: She said "I don't" and she thinks she has to say "Yes" or "No" and may she know that she also can say, "I don't know"?

MR. ADCOCK: Can you answer that question "Yes" or "No"?

MRS. RICE: I just don't believe in, I just couldn't put anybody to death. That is what I believe.

BY MR. ADCOCK:

Q That is what we want, an answer. Is that irrevocable? You firmly believe in that and you could never give the death penalty?

A No, sir.

Q Is that correct? Would you speak up for the record.

A Yes, sir.

Q And therefore, regardless of what the facts may show during the trial in a death penalty case, you would automatically exclude from your consideration the death penalty because of the way you feel about it. Is that true?

A Yes, sir.

MR. ADCOCK: We challenge.

MR. TINKER: May I ask her a question, Your Honor.

CROSS-EXAMINATION

BY MR. TINKER:

Q Counsel told you that nobody would pressure you to change your mind, and that is not so.

MR. ADCOCK: Your Honor, we are going to object to that. This Counsel knows that we have certain legal rules we must go by, put down by the Supreme Court of the United States in the Witherspoon case. I didn't write those words, and this lady didn't either. But, we have a right to listen to her. And, I think that is what she said all along, and that is why I challenge.

MR. TINKER: That is a speech, Your Honor, and I object to it.

THE COURT: Overruled.

MR. TINKER: It wasn't an objection. It was

a speech explaining why he challenged her, and I object. I would ask the Juror to be instructed to disregard that.

THE COURT: You can disregard his comments.

BY MR. TINKER:

Q The Supreme Court didn't say anything about pressuring you to change your mind. Here is the deal; okay?

You said that you believed in the death penalty as long as somebody else does it, as I understand it was what you said.

A Yes.

Q You understand that you have a duty as a citizen to serve on a Jury if you qualify?

A Yes, sir.

Q These questions we ask go to a decision to be made whether or not in this case you qualify. Do you feel like the Jury -- you have a duty to serve on a Jury? Do you think that is good that people have that duty?

A Yes, sir, uh-huh.

Q What I want to ask you is: Can you set aside the fact that you don't want to have to do it, and set aside -- you don't really have expressed convictions against the death penalty, do you? You believe that is good, but you just don't want to have to do it yourself?

A Yes, sir.

Q Can you set aside this -- I'm going to refer to it as a feeling that you don't want the responsibility, can you set that aside and serve on a Jury and decide what the facts are and make a decision about, for instance, in a case, the guilt or innocence of someone accused of a crime? Could you do that without regard to the fact that you don't want to do it?

A Yes, sir.

Q You may suspect that people -- almost everybody that comes in doesn't want to have to serve because it is a serious proceeding. We know that. Okay?

A Uh-huh.

Q But, I want to ask you: Can you set aside the way you feel, and your deep concern, which you should have, in my opinion, can you set that aside ---

MR. ADCOCK: Your Honor, we are going to object as to what his opinion is.

MR. TINKER: I think any citizen ---

THE COURT: Overruled.

BY MR. TINKER:

Q I think any citizen should have a deep concern about serving on a Jury which might, depending on the evidence, cause them to have to make a decision about someone's life.

I understand that. I want to ask you if you can set your feeling about not wanting to do it aside and do your duty as a citizen? Can you do that? That is all we require.

MR. ADCOCK: Is he talking about the death penalty, Your Honor, or is he talking about serving on a Jury on the guilt or innocence stage? He has been talking about guilt or innocence, and that is what my objection is about. Then he slides in and gives the impression he is talking about the death penalty. I don't understand.

THE COURT: Well -- overruled.

MR. TINKER: Your Honor, the fact he doesn't understand doesn't concern me a bit, as long as this Juror understands.

THE COURT: Overruled.

BY MR. TINKER:

Q Can you set aside the conviction or the feeling that you just don't want to have to serve on a Jury and make that kind of decision -- I'm talking about the death penalty; you understand that?

A If you are talking about the death penalty.

Q And, can you set your concern of not wanting to do that or have to make that decision aside and do your duty as a citizen and just answer these questions and say "Yes" or

"No" as to the guilt or innocence? Can you do that?

MR. ADCOCK: Again, Your Honor, he is coming up "Yes" or "No" as to guilt or innocence.

THE COURT: Let her answer. He has a right to do -- I will overrule the objection. As long as you keep interrupting, we will never get through with this woman's interrogation.

MR. ADCOCK: In the guilt or innocence stage, they don't say "Yes" or "No." At the punishment stage, they say "Yes" or "No," and that is the law of this state.

THE COURT: We are just trying to find out whether or not she can vote for the death penalty.

MR. ADCOCK: Fine. If he will ask that question, I will agree.

MR. TINKER: Your Honor, I let him ask the questions the way he wanted to ask his questions, and I have a right to ask my questions the way that I want. And, the Judge has said that I can.

BY MR. TINKER:

Q Can you set aside your reluctance to serve on a Jury to make this serious kind of decision and do your duty as a citizen and make whatever decision, based upon the evidence before you that the law might require? Can you do

that? That is all we need.

A I really don't know.

Q If you don't know, that is fine; you see? A "don't" know" answer is all right.

MR. ADCOCK: Your Honor, he is telling her -- telling her that is all right.

MR. TINKER: Well, he told her she had to answer "Yes" or "No." I think I have a right to tell her that it is all right to say "I don't know," if that is her true feeling.

MR. ADCOCK: I think when the Court instructed the panel, he asked that the panel make that decision and ---

THE COURT: Well, we would like to have a "Yes" or "No" answer. I will put it that way, if you can give us a "Yes" or "No" answer.

BY MR. TINKER:

Q If you can't, you can't. Do you know for sure one way or the other whether you can or can't?

A No, sir.

MR. TINKER: I will pass the Juror.

MR. ADCOCK: Are you telling me now that ---

MR. TINKER: He has asked the questions of her that ---

MR. ADCOCK: I haven't even said anything, Judge.

MR. TINKER: He is still dealing with the question of the death penalty. I do object to that. I would submit that she is qualified.

THE COURT: Overruled. I think she is qualified. I think this is exactly what Witherspoon had in mind.

MR. ADCOCK: Are you telling us now, ma'am, that you could, in a proper case ---

MR. TINKER: It is my understanding, Your Honor, the Court has ruled with regard to that question.

THE COURT: Yeah, I have ruled regarding the challenge.

MR. ADCOCK: Your Honor, the question is, now, "I don't know." I have received, because of her feelings, that she could never give the death penalty because of what it would do to her.

THE COURT: It is not the impression I got. I got the impression she could do this if she had to.

MR. ADCOCK: Would the Court allow me to ask a further question.

THE COURT: We could keep going back and forth in here all day, Mr. Adcock. I don't run a Court that way. I have overruled your challenge.

REDIRECT EXAMINATION

BY MR. ADCOCK:

Q Are you telling us now, then, that you can sit in judgment in this case and assume the full responsibility of a Juror?---

MR. TINKER: Your Honor, he is asking the same question.

MR. ADCOCK: That is not true.

THE COURT: Overruled.

BY MR. ADCOCK:

Q --- and assume the full responsibility of a Juror and be fair to both sides as to the facts and the punishment and take that oath of office?

A No.

Q Why can't you?

A I just couldn't.

Q Couldn't what?

A Like I said, I could not put anybody to death. I'm probably getting all mixed up. I'm sorry, but that is my opinion.

Q That is what I'm getting at. Nobody is trying to

force you to, and Your Honor, I think that you can see now that this lady is mixed up. She has told this Court, and I think we have a right to ask questions.

THE COURT: Go ahead.

MR. ADCOCK: Thank you, Your Honor.

THE COURT: Ask that question, the key question, whether or not she is irrevocably committed.

BY MR. ADCOCK:

Q Mrs. Rice, as you sit right here now, would you vote against the death penalty as a Juror in a Capital Murder case, regardless of the facts and circumstances that might emerge during the trial of the case?

A Yes, sir.

Q And, as you sit here right now, are you irrevocably committed at this time to vote against the death penalty, regardless of the facts and circumstances that might emerge during the trial?

A Yes, sir.

MR. ADCOCK: We challenge.

THE COURT: Okay. I'll sustain the challenge. You may be excused, Mrs. Rice. You are free to go home.

MR. TINKER: Your Honor, may I ask some more

questions of this Juror?

THE COURT: No.

MR. TINKER: I do object to her being challenged. You get to go. I object to her being challenged, Your Honor.

THE COURT: Okay. That is all. We will break until 1:30. We will recess until 1:30.

[Court is recessed until 1:30.]

81-6110

Supreme Court, U.S.
FILED
JAN 22 1982
Alexander L. Stevas, Clerk

NO. A-577

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED
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SUPREME COURT, U.S.

HENRY MARTINEZ PORTER

Petitioner

vs.

THE STATE OF TEXAS

Respondent

MOTION FOR PERMISSION TO
PROCEED IN FORMA PAUPERIS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes HENRY MARTINEZ PORTER, Petitioner, and respectfully moves the Court to allow him to proceed in forma pauperis on his application for writ of certiorari to the Court of Criminal Appeals of Texas, and would show the Court as follows:

1.

Petitioner was convicted of Captial Murder on May 31, 1979, in the 214th Judicial District Court of Nueces County, Texas, on an indictment charging Capital Murder. Petitioner received the Death Penalty. Petitioner has been confined since that date and is confined in the Texas Department of Corrections, Huntsville, Texas.

2.

Petitioner perfected his appeal to the Court of Criminal Appeals of Texas and that Court affirmed the judgment of the Trial Court by written opinion delivered on October 21, 1981, and that Court denied Petitioner's Motion for Leave to File a Motion For Rehearing, without written opinion on November 25, 1981. Petitioner's Trial and Appeal were by forma pauperis.

The opinion of the Court of Criminal Appeals affirming Petitioner's conviction and sentence raises federal constitutional claims as to which review in this Court will be sought, including:

a. Whether the Court of Criminal Appeals of Texas erred in holding that the rule in Witherspoon v. Illinois, 391 U.S. 510 (1968) was not violated by the exclusion for cause of six prospective jurors who were not disqualified to serve as jurors in the capital case.

b. Whether the Court of Criminal Appeals erred in ruling that petitioner had not been denied due process as a result of the trial court's failure to order a psychiatric examination of petitioner when a request for the judgment of the Trial Court on October 21, 1981, and that Court denied Petitioner's petition for rehearing on November 25, 1981. Said trial and appeal was by forma pauperis.

Petitioner feels that he has just cause for appeal in this case.

WHEREFORE, premises considered, Petitioner respectfully prays that this Court allow Petitioner to proceed in forma pauperis on his petition for writ of certiorari to the Court of Criminal Appeals of Texas.

JOHN M. ANDERSON
1102 Continental Life Bldg.
Fort Worth, Texas 76102
(817) 336-3340

DOUGLAS TINKER
Tinker & Tor
622 S. Tancahua
Corpus Christi, Texas 78403
(512) 882-4378

RECEIVED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

HENRY MARTINEZ PORTER,

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

AFFIDAVIT

I, Henry Martinez Porter, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: 1. I am the petitioner in the above-entitled case. 2. Because of my poverty I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe that I am entitled to the redress I seek in said cause. 5. The nature of said cause is briefly stated as follows:

I was convicted of capital murder in the 214th District Court of Nueces County, Texas. The sentence was death. This present proceeding was commenced on a petition for a Writ of Certiorari as provided under 28 U.S.C., Sec. 1257 (3) on the grounds that I was denied a fair and impartial trial due to unconstitutional exclusion of certain veniremen and the admission of evidence that had been obtained as a result of an unconstitutional search and seizure. The Petitioner believes he is entitled to the redress he seeks.

Henry Martinez Porter

Henry Martinez Porter

STATE OF TEXAS §

COUNTY OF WALKER §

Before me, the undersigned Notary Public, on this day personally appeared HENRY MARTINEZ PORTER, who being by me duly sworn on his oath deposed and said that he had read the above and foregoing affidavit and that every statement contained therein is within his knowledge and true and correct.

Henry Martinez Porter
HENRY MARTINEZ PORTER

Subscribed and sworn to before me on the 24th day of December, 1981, to certify which witness my hand and official seal.

Arthur H. Velasquez
Notary Public in and for
Walker County, Texas.

Arthur H. Velasquez
Notary Public in and for State of Texas
My Commission Expires 6-30-85

Opposition

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SUPREME COURT, U.S.

NO. 81-6110

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

HENRY MARTINEZ PORTER,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

LESLIE A. BENITEZ
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I. DID THE TRIAL COURT ERR IN EXCLUDING FOR CAUSE SIX VENIREMEN WHO UNAMBIGUOUSLY MAINTAINED THAT THEY WOULD AUTOMATICALLY VOTE AGAINST THE IMPOSITION OF THE DEATH PENALTY NO MATTER WHAT THE TRIAL REVEALED?

II. DID THE TRIAL COURT ERR IN REFUSING TO ORDER PETITIONER EXAMINED BY A PSYCHIATRIST DURING THE TRIAL WHERE THERE WAS NO EVIDENCE TO RAISE A QUESTION OF COMPETENCY TO STAND TRIAL?

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NO. 81-6110

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

HENRY MARTINEZ PORTER,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition:

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, delivered October 21, 1981, is reported at 623 S.W.2d 374 (Tex.Crim.App. 1981) and is attached to the petition as Exhibit A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claims upon the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was first tried in June 1976 for the 1975 murder of Henry P. Mailloux, a Fort Worth, Texas, police officer, acting in the lawful discharge of his duties. The jury found Petitioner guilty and assessed punishment at death, but the conviction was reversed by the Texas Court of Criminal Appeals. Porter v. State, 578 S.W.2d 742 (Tex.Crim.App. 1979).

Petitioner was retried in May, 1979, in Nueces County, Texas, on a change of venue from Tarrant County, Texas. A second jury found Petitioner guilty and punishment again was assessed at death. This conviction was affirmed on October 21, 1981, and rehearing was denied on November 25, 1981.

SUMMARY OF THE ARGUMENT

There are no special or important reasons for review of this case. A review of the state court records reveals that each of the six veniremen excluded for cause from this capital case were unambiguously committed to vote against the imposition of the death penalty no matter what the trial revealed. As such, their exclusion did not violate the doctrine of Witherspoon v. Illinois, 391 U.S. 510 (1968).

The trial court did not err in refusing to order Petitioner examined by a psychiatrist during the course of the trial. The record reflects no evidence to raise a bona fide doubt as to Petitioner's competence to stand trial. As such, no inquiry into competency was constitutionally mandated.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reason in this case and none exists.

II.

THE TRIAL COURT DID NOT ERR IN EXCLUDING FOR CAUSE SIX VENIREMEN WHO UNAMBIGUOUSLY MAINTAINED THAT THEY WOULD AUTOMATICALLY VOTE AGAINST THE IMPOSITION OF THE DEATH PENALTY NO MATTER WHAT THE TRIAL REVEALED.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court held, inter alia, that in a capital trial, no venireman could be excluded for cause for his views regarding the imposition of the death penalty unless he made unmistakably clear that he would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed" at trial. 391 U.S. at 522-523 n.21. See also, Boulden v. Holman, 394 U.S. 478 (1969); Davis v. Georgia, 429 U.S. 122 (1976); Adams v. Texas, 448 U.S. 28 (1980). Because the record in the instant case reflects that each venireman unequivocally maintained that he would automatically vote against the imposition of the death penalty, the exclusion for cause of each was constitutionally permissible. 1/

1/ Contrary to Petitioner's contentions, the holding of Adams v. Texas, supra, is not controlling, as the record reflects that the examination of the veniremen was conducted utilizing only the Witherspoon test and not Article 12.31(b), V.A.C.C.P. The only mention of what "effect" the death penalty would have on the juror came as a result of defense counsel's question (SF 563-564).

A comparison of the petition with the state court records reveals that Petitioner has very selectively quoted from the record, omitting very significant portions of the record. Venireman Herndon twice testified that regardless of the facts and circumstances, she could never vote to impose the death penalty (SF 274), and twice affirmed that she would automatically vote against the penalty of death (SF 274). She twice unequivocally affirmed that she was irrevocably committed to this position before the trial began, regardless of what facts or circumstances could be adduced (SF 275). There were no cases in which she believed that death was a permissible punishment (SF 275). Although she once stated to defense counsel that she could "do [her] duty as a juror," as the prosecutor correctly pointed out, defense counsel, in his question, never informed the prospective juror that the "duty" could include rendering a verdict which would result in death (SF 276). As found by the Court of Criminal Appeals, this general question and answer, which did not focus on the issue of punishment, was insufficient to rehabilitate the juror and overcome her earlier unambiguous, unequivocal and unmistakably clear assertions that, prior to the trial, she was irrevocably committed to automatically vote against the imposition of the death penalty no matter what the facts and circumstances might reveal.

Venireman Martinez maintained that he could never vote to impose the death penalty, even if the facts so warranted (SF 555, 556), and that he would refuse to do so regardless of the facts presented (SF 556). He was committed, before trial, to vote against death regardless of the facts (SF 557). He reiterated that he was irrevocably committed to automatically vote against death, regardless of the facts (SF 559). Although he once affirmed that he could "do [his] duty as a citizen," when it was explained to him that this could include imposing the death penalty if the facts justified it (SF 561-561), he retreated and

testified that he could not set aside his "expressed convictions and [his] disbelief in the death penalty and do [his] duty as a citizen" (SF 562). 2/

Venireman Vaughn five times clearly and unequivocally testified that he would automatically vote against the imposition of the death penalty, no matter what the facts or circumstances revealed (SF 610, 611, 613). He then stated that he could serve as a juror and was willing to listen to the evidence (SF 615-616). 3/ When the effect of affirmative answers to the special issues submitted pursuant to Article 37.071, V.A.C.C.P. was explained to him, however, he retracted this statement, and testified that if a "yes" answer meant that death would be imposed, he would automatically vote "no" to the questions (SF 618-619).

Venireman Cantu five times testified that he would automatically vote against the imposition of capital punishment, regardless of what the trial might reveal, and that he was committed before trial to do so (SF 822, 823). While he once stated that he could listen to the facts and make a decision based thereon (SF 825), subsequent questioning by defense counsel reveals that this was in regard to guilt or innocence, not punishment (SF 825 L. 21-25). Further, in response to this question, the venireman indicated that he did not think that he could make a decision regarding guilt based solely upon the evidence (SF 826). Thus, in addition to the venireman's inability to consider the full range of punishment, it appears also that he could not be fair and impartial on the issue of guilt. See, Lockett v. Ohio, 438 U.S. 586 (1978).

2/ It was at this point that defense counsel asked the venireman what "effect" the death penalty would have on his deliberations (SF 563-564). The venireman's response that he would "have it on [his] conscience" and "worry about it" in no way negated or rendered equivocal his previous testimony that he would automatically vote against the death penalty.

3/ Petitioner's exhibit containing the voir dire examination omits five pages of this venireman's testimony (SF 614-619).

Venireman Prue five times clearly and unequivocally testified that she would automatically vote against the imposition of capital punishment, regardless of the evidence revealed at trial, and that she would answer at least one of the special issues "no" to avoid the imposition of the death penalty (SF 1166, 1167, 1168, 1169). Although she once stated that she could "do [her] duty as a citizen," (SF 1170), as the prosecutor correctly pointed out in his objection to defense counsel's general and vague question, defense counsel never explained what this "duty" was or that it might entail returning a verdict which would result in death (SF 1170-1171). Thus, her earlier unambiguous and unequivocal responses were not rendered equivocal by this vague and incomplete defense question regarding a juror's "duty."

Venireman Rice five times testified that she would automatically vote against the imposition of the death penalty no matter what the trial revealed (SF 1098, 1100, 1102, 1103) and maintained that she would be compelled to answer the special issues "no" because affirmative answers would result in the imposition of death (SF 1100). When she once expressed uncertainty about whether she could base her verdict on the evidence adduced, the trial court overruled the state's challenge (SF 1107-1109). Upon further questioning, however, Rice maintained that she could not be fair to both sides (SF 1110) and then twice maintained that she was irrevocably committed to vote against the death penalty, regardless of the facts and circumstances. The record reflects that her final responses were unequivocal and unambiguous.

Thus, a fair reading of the voir dire examination of each of these six veniremen reveals that each unequivocally maintained he or she would automatically vote against a death sentence in all circumstances. As such, none was excused in violation of Witherspoon v. Illinois.

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO ORDER PETITIONER EXAMINED BY A PSYCHIATRIST DURING THE TRIAL WHERE THERE WAS NO EVIDENCE TO RAISE A QUESTION OF COMPETENCY TO STAND TRIAL.

Petitioner contends that there was a question raised of his competency to stand trial, and that the trial court erred in denying his request to order a psychiatric examination to be conducted on Petitioner during the course of the trial. Because the record reveals that there was no evidence presented to the court to raise a question of competency, the court did not err in refusing to order the examination.

The record reflects that at the conclusion of the jury selection, the prosecutor for the first time discovered a report which contained a reference to Petitioner when he was a juvenile. The prosecutor promptly revealed this information to the court and defense counsel. The report was undated, and simply contained one reference to the fact that Petitioner, as a juvenile, once had been sent to the State Hospital at Austin, Texas, because he had hallucinations of seeing his father (SF 1620, 1628, 1635-1636). Defense counsel never requested a competency hearing, but subsequently requested that the court order Petitioner to be examined by a psychiatrist (SF 1863-1866). The court denied the request.

In Pate v. Robinson, 383 U.S. 375 (1966), this Court held that where the evidence raises a bona fide doubt as to a defendant's competence to stand trial, the judge, sua sponte, must conduct an inquiry into the defendant's mental competency. See, Lokos v. Capps, 625 F.2d 1258 (5th Cir. 1980); Reese v. Wainwright, 600 F.2d 1085 (5th Cir. 1979).

The trial court had no constitutional duty to order a psychiatric examination, as no bona fide doubt was raised as to Petitioner's competence to stand trial. The evidence was best summarized by the Court of Criminal Appeals:

> In the case before us the only evidence that pertains to the appellant's incompetency to stand trial is a report that was undated, unsigned, and of unknown origin. The behavior mentioned in the report apparently occurred when the appellant was a boy or a young man; the appellant was thirty-seven years old at the time of the trial. The behavior in the report does not give any indication that the appellant did not have a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against him." No other evidence concerning the appellant's competency was presented and appellant's behavior throughout the trial was not such as to raise any issue of his incompetency. The appellant did not request a hearing on incompetency. There was simply no evidence whatsoever offered which dealt with the appellant's present incompetency to stand trial.

623 S.W.2d at 830. Because there was no evidence before the court which raised a bona fide doubt as to Petitioner's competency, the court had no constitutional duty to order a psychiatric examination and conduct an inquiry into Petitioner's competency to stand trial.

CONCLUSION

For the reasons discussed above, Respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

Leslie A. Benitez

LESLIE A. BENITEZ
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT